TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1952

No. 23

THE CITY OF CHICAGO, A MUNICIPAL CORPORATION, PETITIONER,

vs.

THE WILLETT COMPANY, AN ILLINOIS CORPORATION

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS

PETITION FOR CERTIORARI FILED MARCH 13, 1952
CERTIORARI GRANTED MAY 5, 1952

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

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CITY OF CHICAGO, A MUNICIPAL CORPORATION,
PETITIONER,

vs.

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ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS

INDEX

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[fols. 1-4] [Caption omitted]

[fol. 5]

IN THE SUPREME COURT OF ILLINOIS, NOVEMBER TERM, A. D. 1949

CITY OF CHICAGO, a Municipal Corporation, Appellant,

vs.

THE WILLETT COMPANY, an Illinois Corporation, Appellee

Appeal from Municipal Court of Chicago

Honorable R. P. Drymalski, Judge Presiding

Abstract of Record from Municipal Court of Chicago

Placita COMPLAINT—Filed March 10, 1949

Complaint filed by the City of Chicago March 10, 1949, in the office of the Clerk of the Municipal Court, No. 49 MC 131413, which, omitting the caption and vertification, is in words and figures as follows:

> Walter Gorski being first duly sworn, on oath, on information and belief, deposes and says, that The Willett Co. D. M. Goodwille Mgr. heretofore, to wit, on the 1st day of March 1949 at the City of Chicago, did then and there violate the Municipal Code of Chicago, to wit:
>
> Did then and there conduct, operate and carry on the business of Carters License Tax 100 trucks on the premises known as 700 S. Desplaines St., Chicago, Illinois, without first having obtained a license so to do.
>
> In violation of Chapter 163-2 of the Municipal Code of Chicago.

[fol. 6] Order entered March 10, 1949 granting leave to file complaint instanter and cause postponed and set for trial April 20, 1949.

Order entered April 20, 1949 cause postponed and set for trial May 4, 1949.

Order entered May 4, 1949, cause postponed and set for trial May 17, 1949.

Order entered May 17, 1949, cause postponed and set for trial June 16, 1949.

Order entered June 16, 1949, cause postponed and set for trial July 7, 1949.

Order entered July 7, 1949, cause postponed and set for trial July 11, 1949.

IN MUNICIPAL COURT OF CHICAGO

WAIVER OF JURY TRIAL—July 11, 1949

Thereupon, defendant on July 11, 1949, defendant elects to waive a trial by jury and cause is submitted to court for trial without a jury.

IN MUNICIPAL COURT OF CHICAGO

JUDGMENT

Now come the parties to this cause, and thereupon this cause comes on in regular course for trial before the Court without a jury and the Court having heard the evidence and the arguments of counsel, and being fully advised in the premises, enters the following finding, to-wit:

"The Court Finds the Defendant Not Guilty."

This cause coming on for further proceedings herein, it is considered by the Court that final judgment be entered on the finding herein, that the plaintiff take nothing by this suit, and it is ordered that said defendant be and hereby is discharged.

IN MUNICIPAL COURT OF CHICAGO

CERTIFICATE OF TRIAL JUDGE

Certificate of the Judge that validity of a Municipal Ordinance is involved, filed July 12, 1949, which, omitting caption and signature, is in words and figures as follows:

[fol. 7] I, Raymond P. Drymalski, Judge of the Municipal Court of Chicago, Illinois, before whom and

by whom the above entitled cause was tried and final decree and order therein entered, do hereby certify that there is involved in said cause and in said final decree and order the validity of a municipal ordinance, and I further certify that in my opinion the public interest requires that an appeal herein shall be taken directly to the Supreme Court of Illinois.

In Municipal Court of Chicago

Notice of Appeal—Filed July 18, 1949

I

City of Chicago, a municipal corporation, plaintiff-appellant above named, hereby appeals from the final judgment order entered in this cause July 11, 1949, finding the issues in favor of the defendant on the complaint by the plaintiff, that the defendant had violated chapter 163 of the Municipal Code of Chicago, and particularly section 163-2 thereof.

[fol. 8] II

Appellant prays that said judgment may be reversed or in the alternative, that said judgment be vacated and the cause remanded for a new trial.

City of Chicago, a Municipal Corporation, Plaintiff-Appellant, by Benjamin S. Adamowski, Corporation Counsel, Its Attorney.

July 18, 1949.

Notice of filing Notice of Appeal filed July 18, 1949.

Praecipe for Record and Proof of Service thereof filed July 18, 1949.

Order entered July 27, 1949, approving Report of Proceedings and ordering same filed.

Report of Proceedings filed July 27, 1949, at the hearing of the above entitled cause before the Honorable Raymond P. Drymalski, Judge of said Court, on the 7th day of July, A. D. 1949.

Present: Mr. Benjamin S. Adamowski, Corporation Counsel for the City of Chicago, by Mr. Marvin Peters, Assistant Corporation Counsel, Appeared for Plaintiff;

Messrs. Daley & Lynch, by Mr. William J. Lynch, Appeared for Defendant.

The Court: Leave given to Mr. Peters to amend the complaint.

[fol. 9] Mr. Lynch: I will ask leave of the Court to file a stipulation mentioned heretofore on behalf of the defendant and the plaintiff in this case.

The Court: Stipulation may be filed.

Mr. Peters: We are going to proceed here to file the stipulation, and then, you are going to put on some evidence.

Mr. Lynch: That's right, on behalf of the defendants.

Stipulation, omitting signatures and caption, in words and figures as follows:

IN MUNICIPAL COURT OF CHICAGO

STIPULATION OF FACTS

It is hereby stipulated by and between the attorneys for the respective parties herein that the following matters and facts, material to the controversy in this cause may be incorporated in the transcript of the record.

It is further stipulated and agreed that the defendant herein expressly reserves the right to object to Chapter 163, Sections 1 to 4 of the Ordinances, of the City of Chicago, on the ground that said Ordinance is void and of no legal effect because it is in conflict with the Constitution of the United States of America, the Constitution of the State of Illinois, Section 23-51, of the Cities and Villages Act, of the State of Illinois and the Illinois Truck Act, Section 240 to 281, of the Motor Vehicle Act, of the State of Illinois.

During all the times herein mentioned, there were in effect, in the State of Illinois, the statutory provisions hereinafter set forth:

[fol. 10] Section 23-51, of the Cities and Villages Act contains the following provisions:

> Smith-Hurd Illinois Annotated Statutes, Chapter 24, Article 23-51. "To license, tax, and regulate hackmen, draymen, omnibus drivers, carters, cabmen, porters, expressmen, and all others pursuing like occupations, and to prescribe their compensation."
>
> Smith-Hurd Illinois Annotated Statutes, Chapter 95½, Motor Vehicles, Section 240.

"Legislative declaration of necessity for truck traffic regulation.

"The legislature hereby declares that the rapid increase of truck traffic and the fact that under the existing laws many trucks designed or used for the transportation of property are not effectively regulated have increased tremendously the dangers and hazards of public highways, thus necessitating the enactment of more stringent regulations for the protection of the general public in the use of the highways; that ruinous competitive practices among carriers of property by truck and for hire are directly responsible in a considerable degree for the appalling loss of life and bodily injury resulting from such traffic hazards; and that in order to conserve the highways, reduce traffic hazards and accidents and promote a sound, economical and efficient system of highway transportation to serve the best interests of the general public, this Act is considered imperative."

That on or about January 14, 1949, the City Council of the City of Chicago enacted a certain Ordinance relating to the licensing of carters in the City of Chicago. The Ordinance is set forth in the bound volume of the Municipal Code of Chicago, as adopted January 14, 1949, in Chapter 163 thereof as follows:

[fol. 11] Be it ordained by the City Council of the City of Chicago:

Section 1. This Ordinance shall be known as Chapter 163 of the Municipal Code of Chicago, and shall be designated as the Carters Ordinance:

Chapter 163

Carters

163-1. Every express wagon, cart, truck, dray, wagon, automobile, autocar, auto truck, or other vehicle of any kind, either drawn by animal or self-propelled, which shall be operated, driven or employed for the purpose of transporting or conveying bundles, parcels, furniture, trunks, baggage, goods, wares, merchandise, produce, or other articles within the city for hire or reward,

shall be deemed a cart within the meaning of this chapter, whether such vehicle is employed or hired from any public stand, public way, barn, garage, office, or other place in the city by the day, week, month or year.

Any person engaged in the business of operating a cart shall be deemed a carter.

163-2. An annual license tax is imposed upon every carter for each cart operated or controlled by him, according to the following schedule:

Horsedrawn vehicle—	
One-horse	$2.75
Two-horse	5.50
Three-horse	6.25
Four-horse	11.00
Six-horse	13.75
Automotive vehicles—	
Capacity not exceeding two ton-	$8.25
Capacity exceeding two but not exceeding three tons	11.00
Capacity exceeding three but not exceeding four tons	13.00
Capacity exceeding four tons	16.50

[fol. 12] No license shall issue except upon payment of the full annual license tax.

It shall be unlawful for any person to engage in the business of a carter without first having paid such license tax.

163-3. An application shall be made in conformity with the general requirements of this code relating to applications for licenses and such application shall include a statement of the number of vehicles with such details of description and on such forms as may be required by the City Collector.

The City Clerk shall deliver to each carter, upon payment of the license tax herein imposed, a license emblem which shall bear the words "carter" and the numerals designating the year for which such license tax has been paid. It shall be the duty of the carter to affix the license emblem in a conspicuous place on the vehicle. It shall be unlawful for any person to drive a cart which does not bear such license emblem.

163-4. Any person violating any of the provisions of this chapter shall be fined not less than fifty dollars nor more than two hundred dollars for each offense and each day such violation shall continue shall be regarded as a separate offense.

Section 2. Chapter 163, entitled "Public Carters" as it has heretofore appeared in the Municipal Code of Chicago is hereby repealed.

Section 3. Chapter 132, entitled "Furniture Movers" of the Municipal Code of Chicago, is hereby repealed.

Section 4. This Ordinance shall be in force and effect upon passage and due publication.

During all the times herein mentioned the plaintiff, City of Chicago, was a Municipal corporation organized and existing under the provisions of the Act of the General Assembly of the State of Illinois, entitled "An Act to provide [fol. 13] the incorporation of Cities and Villages," approved April 10, 1872, in force July, 1872, and the amendments thereto and the Acts supplemental thereto.

The Defendant, the Willett Company, an Illinois corporation located at 700 South Desplaines Street, Chicago, Illinois, was at all times mentioned herein engaged in the business of transporting property by motor vehicles for hire in the City of Chicago and the State of Illinois, and as also engaged as a contract carrier of commodities and freight generally by motor vehicle, operating from points and to places within the State of Illinois to points and places in the States of Indiana and Wisconsin.

That on or about the first day of March, 1949, the Willett Company advertised and held itself out to serve the public and connecting carriers and forwarding companies generally, up to the limit of his capacity either (a) by leasing trucks with drivers to shippers by the hour, day, week, year or other period, (b) by making contracts with shippers to perform all trucking for a fixed period, (c) by giving occasional service or handling single shipments in local cartage for any shipper, at a rate per hundred pound, per ton, per piece, or other unit, (d) by distributing pooling cars and (e) by rendering collection and delivery service, station or sub-station service for rail, water and highway motor carriers and forwarding companies either under contract or on some other basis.

The motor vehicles operated by the Willett Company will in the course of a day's business transport property for hire:

1. From points within the City of Chicago to other points within the City of Chicago.

[fol. 14] 2. From points within the City of Chicago to other points in the State of Illinois outside the City of Chicago.

3. From points in the State of Illinois outside the City of Chicago to points within the City of Chicago.

4. From points in City of Chicago to points in Indiana.

5. From points in Indiana to points in the City of Chicago.

6. From points in Illinois, outside of the City of Chicago, to points in Indiana.

7. From points in Indiana to points in Illinois, outside of the City of Chicago.

8. From points in City of Chicago to points in Wisconsin.

9. From points in Wisconsin to points in the City of Chicago.

10. From points in Illinois, outside of the City of Chicago to points in Wisconsin.

11. From points in Wisconsin to points in Illinois, outside of the City of Chicago.

The Willett Company does not use or operate any horses or teams in the conduct of its business.

The Willett Company has not complied with the provisions of the Carters Ordinance as enacted by the City Council and has not secured licenses as provided therein.

The Willett Company does not solicit any business from any public stand or street in the City of Chicago, and the Willett Company has secured City Vehicle Licenses for all vehicles operated by them for the year 1949, and have complied with all City Ordinances that are necessary to be complied with to lawfully conduct its cartage business in the City of Chicago with the exception of the Carters Or-

[fol. 15] dinance herein in question.

The Willett Company has presently been granted authority from the Interstate Commerce Commission to operate as a common carrier, engaged in interstate commerce,

as evidenced by Certificate No. 20697, which certificate and authority is in full force and effect.

The Willett Company has filed with the Interstate Commerce Commission, the Willett Company Schedule No. 20, on the first day of July, 1948, and effective on the fourth day of August, 1948.

The Willett Company complies with all provisions of the Federal Motor Carrier Act of 1935, and all rules and regulations issued by the Interstate Commerce Commission relative to hours of service for its employes and rules of safety in the operation of its vehicles.

Pursuant to the provisions of the Illinois Motor Truck Act, the Willett Company has been granted authority to operate as a specialized, contract and local motor carrier of property in the State of Illinois said authority being evidenced by the following certificates, to-wit:

Local Carrier—Certificate No. 1132
Contract Carrier—Certificate No. 1163
Specialized Carrier—Certificate No. 11363

which certificates and authority are presently in full force and effect.

The Willett Company has complied with all other provisions of said Illinois Truck Act.

That the operations of the Willett Company are so diversified that one of the trucks may at various times during [fol. 16] the day haul to or from interstate contract carriers, common carriers and carload companies, in addition to haul between local industries and for them to points and places in Wisconsin, Indiana, and Illinois.

That no one vehicle operated by the Willett Company is engaged throughout any day of the year in a purely intrastate or local movement. Each vehicle of defendant during every single day of the year carries on it along with property which never leaves the city, property destined to some point in the State of Illinois outside the City of Chicago, as well as property destined to some point outside the State of Illinois.

That there are in the City of Chicago upwards of 1,000 persons, firms, or corporations engaged in the transportation of property by motor vehicles for hire and are transporting or conveying goods, wares, or merchandise upon the public streets of the City of Chicago.

That there are upwards of 2,000 individuals, firms, or corporations that are engaged in the transportation of property by motor vehicles for hire and are common and/or contract carriers of commodities and freight generally by motor vehicles, operating from points within the City of Chicago to points within the City of Chicago; from points within the City of Chicago to points within the State of Illinois outside the City of Chicago; from points within the City of Chicago to points in the State of Indiana and Wisconsin.

That there are therefore upwards of 3,000 individuals, firms or corporations so engaged, as to allegedly come [fol. 17] within the terms and provisions of this Ordinance, and who are similarly situated with the Defendants as to matters and things complained of herein.

That on or about the first day of March, 1949, the Defendant, the Willett Company, an Illinois corporation, was charged by the City of Chicago, with a violation of Chapter 163, of the Municipal Code of Chicago and on said date was served with an arrest notification commanding it to appear in the Municipal Court of Chicago on March 10, 1949, to answer the charge of engaging in the business of a carter, without having obtained a license to engage in such business.

It is further stipulated and agreed, that the annual budget of the City of Chicago as passed in January, 1949, provides no appropriation for the regulation of the business of Carters.

It is further stipulated and agreed that on the 14th day of January, 1949, the City Council of the City of Chicago passed the Carters Ordinance.

It is further stipulated and agreed that the terms of the Carters Ordinance do not impose any regulation upon the business of Carters nor does it prescribe any compensation to be received by Carters, but requires that Carters purchase an annual license for a certain fee.

[fol. 18] HOWARD L. WILLETT, JR., called as a witness on behalf of the defendant, having been first duly sworn, testified as follows:

Direct examination

By Mr. Lynch:

My name is Howard L. Willett, Jr. I live at 1120 Lake Shore Drive. I am Executive Vice-President in The Willett Company, the defendant in this cause, continuously since 1932. The Company is engaged in the occupation of general trucking. In the course of our operation as general trucking, we engage in the hauling of interstate, intrastate, and local freight in the City of Chicago.

Q. Is it possible for you in your operation to separate your intrastate freight, your interstate freight, and your inter-city freight from your vehicles?

Mr. Peters: That is objected to unless Counsel lays a proper foundation. It is calling for the conclusion of the witness based on no facts in evidence.

The Court: I will overrule the objection.

A. No, we are not able to separate.

Mr. Lynch: Mr. Willett, could you withdraw from your interstate business and continue in your intrastate business?

Mr. Peters: I object for the same reason—nothing in the evidence here except that he is engaged in three different types of operation.

The Court: Why is that objectionable? I don't follow you.

Mr. Peters: Well, all he has testified to is all leading up to, he is engaged in interstate, intrastate, and inter-city operations.

[fol. 19] The Court: You can go into that on cross-examination. I overrule the objection.

Q. Could you withdraw from interstate business and continue in your intrastate business?

A. Not without considerable hardship.

Q. Could you withdraw from your inter-city, that is your local business, and continue either interstate or intrastate business?

A. No.

Mr. Peters: Let the record show my objection to the question.

The Court: All right.

The Witness. In other words, interstate, intrastate and local city business is not divisible. In general trucking we offer the public a flexibility of service.

Cross-examination.

By Mr. Peters:

The Willett Company and the Truck Lease Corporation of America together operate about 1,200 vehicles. Some are trucks, some are known as tractors, some are trailers, and included in there is the Willett transports. Operating under the name of The Willett Company I would say there are about 825 trucks.

Q. Are any of those 825 trucks operated in local transports where you transport from one point in Chicago to another point in Chicago?

A. I would say almost all of them were. We have contracts with certain concerns in Chicago to do all their hauling. Some of the larger contracts are with Pennsylvania Railroad, Acme Fast Freight, The Air Cargo, which represents all the airlines, Ryerson Steel Company, U. S. Steel Company, Youngstown Steel Company, H. J. [fol. 20] Heinz Company, Standard Brands—I don't know how many more you want. The Glidden Company, the Nubian Paint Company, the Durkee Famous Foods, the Soy Products Company, and Adams and Elding Paint Company each has a different address, all located within the City of Chicago.

We furnish the Glidden Company about a dozen trucks. When those trucks go to the Glidden Company they pick up articles at the Glidden Company and those articles are transported in part to points in the City of Chicago.

I don't know how much of that trucking service is local, interstate or intrastate. The Willett Company is paid by the truck and by the day, and some charges are by the hundred weight and by the mile. Our Company does not keep any record to determine the proportion of interstate as compared to intrastate and local operations. The same type of service we render the Glidden Company is rendered to all the other concerns that I mentioned.

As far as the entire operations of the Willett Company are concerned, there is no way in which we can determine the proportion of local transportation as compared to interstate and intrastate. The operations I have described are the same as on the first of March, 1949.

Redirect examination.

By Mr. Lynch:

Q. Now, Mr. Willett, state for example, that the Glidden Company—let's take one truck—It is possible in that operation, is it not, that a vehicle operating out of the Glidden Company may have on it in total load intrastate, interstate, and inter-city; is that correct?

A. That is correct.

[fol. 21] Q. And for the Pennsylvania Railroad, one of the customers that you have listed here, that would be—freight that is picked up from the railroad that would be interstate and delivered in and about the City of Chicago?

A. That is true.

Q. And also you pick up freight, would you not, in and about the City of Chicago for the Pennsylvania Railroad for places and points destined outside of the City of Chicago and the State of Illinois?

A. That is true.

Mr. Lynch: That is all if the court please.

Mr. Peters: No further cross.

(Which is all the testimony heard in the above entitled cause.)

Certificate of the trial judge that the Report of Proceeding is full, true and correct and ordering that same be filed.

Stipulation that original Report of Proceedings be incorporated by the Clerk of the Municipal Court in the transcript of the record.

Order entered August 2, 1949, granting leave to file amended Complaint *nunc pro tunc* as of July 7, 1949.

In Municipal Court of Chicago

Amended Complaint nunc pro tunc

Amended Complaint filed *nunc pro tunc* as of July 7, 1949, which, omitting the caption, signatures, and verification, is in words and figures as follows:

William T. Prendergast being first duly sworn, on oath, on information and belief, deposes and says, that The Willett Company, an Illinois corporation, heretofore, to wit, on the 1st day of March, 1949, at the City of Chicago, did then and there violate the Municipal Code of Chicago, to wit:

[fols. 22-23] 1. That the defendant, The Willett Company, an Illinois Corporation, did engage in the business and occupation of transporting and conveying bundles, parcels, furniture, trunks, baggage, goods, wares, merchandise, produce or other articles by motor truck within the City of Chicago for hire or reward.

2. That said defendant violated Chapter 163 of the Municipal Code of Chicago and particularly Sec. 163-2 thereof, in that said defendant failed to pay the annual license tax for the year 1949 as provided by Sec. 163-2.

In violation of Chapter 163 of the Municipal Code of Chicago.

Certificate of the Clerk of the Municipal Court of Chicago, August 16, 1949, certifying that the foregoing is a true, perfect and complete transcript of the record as per Praecipe and Stipulation.

Respectfully submitted, Benjamin S. Adamowski, Corporation Counsel of the City of Chicago, 511 City Hall, Chicago 2, Illinois, Attorney for Appellant; L. Louis Karton, Head of Appeals and Review Division; Louis H. Geiman, Marvin J. Peters, Assistant Corporation Counsel, Of Counsel.

[fol. 23a] IN THE SUPREME COURT OF ILLINOIS, NOVEMBER TERM, A. D. 1949

CITY OF CHICAGO, a Municipal Corporation, Appellant,

vs.

THE WILLETT COMPANY, an Illinois Corporation, Appellee.

Appeal from Municipal Court of Chicago. Honorable R. P. Drymalski, Judge Presiding

EXCERPTS FROM BRIEF AND ARGUMENT FOR APPELLANT—Filed December 20, 1949

[fol. 23b] (4) The issues and the Decision Thereon

The trial court made no specific findings of fact nor held any specific conclusions of law, but simply entered a general finding of "not guilty" in favor of the defendant (Abst. 2), and entered final judgment upon said finding that the plaintiff take nothing by its action and that the defendant be discharged (Abst. 2). Consequently, it is impossible to determine the precise grounds of the trial court's determination. However, some clue is afforded by the express reservation in the stipulation on the part of the defendant of the right to object to the ordinance on the ground that it was void and of no legal effect because in conflict with the Federal and State Constitutions, with Section 23-51 of the Revised Cities and Villages Act, and with the provisions of the Illinois Truck Act (Abst. 5). Further, the defend-
[fol. 24] ant, in its brief filed in the trial court, asserted specifically (1) that the City of Chicago was without statutory power to pass the ordinance in question; (2) that even if it ever had such power, it was withdrawn by the provisions of the Illinois Truck Act; and (3) that the ordinance was in any event invalid as an interference with and a burden upon interstate commerce, and thus violative of the commerce clause of the Constitution of the United States. It is manifest, therefore, that the judgment in favor of the defendant was necessarily based upon the trial court's conclusion that the ordinance was invalid and unenforceable on any or all of the grounds just enumerated.

The city, as the appellant herein, must necessarily assume that the trial court has determined all of the aforementioned issues against it, and hence we shall seek to demon-

strate herein that the trial court's decision was erroneous and should be overturned in respect of each and every such determination.

Errors Relied upon for Reversal

(1) The trial court erred in admitting, over plaintiff's objection, incompetent, irrelevant and immaterial evidence offered on behalf of the defendant.

(2) The trial court erred in finding the defendant not guilty.

(3) The finding of not guilty was against the law and the evidence.

(4) The trial court erred in entering judgment against the plaintiff and in favor of the defendant, and in ordering defendant discharged.

[fol. 25] (5) The judgment of the trial court was against the law and the evidence.

(6) The trial court erred in holding as a matter of law that the ordinance in question was in violation of the commerce clause of the Federal Constitution as an interference with or a burden upon interstate commerce.

(7) The trial court erred in holding as a matter of law that the ordinance was in violation of the Illinois Constitution with respect to the exercise by the City of Chicago of the taxing power.

(8) The trial court erred in holding as a matter of law that the enactment of the ordinance in question was beyond the power granted to the City of Chicago by Section 23-51 of the Revised Cities and Villages Act.

(9) The trial court erred in holding as a matter of law that the enactment of the ordinance in question was beyond the power of the City of Chicago on the ground that such power was withdrawn by the Illinois Truck Act.

(10) The trial court erred in holding as a matter of law that the enactment of the ordinance in question was beyond the power of the City of Chicago on the ground that such power was withdrawn by the Federal Motor Carrier Act of 1935.

[fol. 26] Points and Authorities

I

The ordinance here involved neither purports nor attempts to tax cartage operations extending beyond the corporate limits of the City of Chicago, but by its terms is confined solely to transportation "within the city", which, by well-settled definition, means from points within the city to other points within the city.

[fol. 27] II

The fact that the defendant company is also engaged in interstate commerce does not destroy the power of the City of Chicago to impose an occupation tax upon the defendant with respect to the intracity operations in which the defendant is admittedly engaged; and, in view of the express limitation of the ordinance to "Within the city" operations, the contention that it violates the commerce clause of the Federal Constitution is without foundation.

[fol. 28] III

The express limitation of the ordinance to intracity operations not only demonstrates its inherent validity, but also refutes the argument of "nonseparability" advanced by the defendant. Moreover, a showing of "nonseparability", without proof of "undue burden", will not invalidate an ordinance, limited to local business, as an infringement upon the federal commerce power.

IV

The Federal Motor Carrier Act of 1935 regulating interstate motor transportation did not withdraw from the several states or their municipalities the power of taxation or regulation of intrastate motor transportation.

Section 302 (b) of Federal Motor Carrier Act of 1935 (49 U. S. C. A., Section 302 (b)).

Tucker v. *Casualty Reciprocal Exchange* (D. C. Ga.), 40 Fed. Supp. 383.

Eichholz v. *Hargus* (D. C. Mo.), 23 Fed. Supp. 587.

[fol. 29] V

The express statutory power of Illinois municipalities to tax and license carters was not affected or impaired either by the enactment of the Illinois Truck Act of 1939 or of the Illinois Public Utilities Act.

[fols. 30-78] VI

The fact that the defendant company pays a city vehicle tax on its trucks for the privilege of using the city streets does not affect the city's power to levy an occupation tax upon the defendant with respect to its use of the same vehicles in its intracity freight trucking operations.

VII

The ordinance herein represents a proper exercise by the City of Chicago of the statutory power granted to municipalities to levy an occupation tax upon carters, and is in all respects valid and constitutional.

(a) Ordinances enacted pursuant to an express grant of power are presumed to be valid.

[fol. 79] In the Supreme Court of Illinois, November Term, A. D. 1949

City of Chicago, a Municipal Corporation, Appellant,

vs.

The Willett Company, an Illinois Corporation, Appellee

Appeal from Municipal Court of Chicago. Honorable R. P. Drymalski, Judge, Presiding

Excerpts from Brief and Argument for Appellee—Filed March 13, 1950

[fol. 80] Defendant's Theory of the Case

It is the Defendant's contention that:—

1. The ordinance defining a "cart" and "carter" does not limit the carriage of freight and merchandise to transportation where both the point of origin and point of desti-

nation of freight is in the corporate limits of the City of Chicago.

2. The intrastate, interstate and local operation of the defendant cannot be separated and the ordinance is therefore in violation of the commerce clause of the Federal Constitution and the Federal Interstate Commerce Act.

3. The Carters Act of the City of Chicago taxes an instrument of interstate commerce and constituted an infringement upon the commerce powers of the Federal Government and the Federal Motor Carrier Act.

[fol. 81] 4. The City of Chicago is without statutory power to tax motor carriers without regulating them and prescribing their compensation under the power granted in the Cities and Villages Act.

5. The ordinance of the City of Chicago taxing Carters is a subterfuge revenue measure to tax personal property contrary to law.

6. The Cartage Ordinance of the City of Chicago places an undue burden upon interstate commerce and an instrumentality of interstate commerce.

7. The Illinois Truck Act repeals the power of the city to tax, license and regulate the business of "Carters."

8. The ordinance is not uniform as to all Carters.

[fol. 82] Points and Authorities

I

The phrase "within the city" does not limit the operation of the Ordinance to transportation where both the point of origin and the point of destination are in the city.

II

The "Carter's Ordinance" constitutes an interference with, and a burden on Interstate Commerce in violation of the Federal Constitution.

III

The "Carter's Ordinance" is in violation of the Constitution of 1870 in that it is not uniform as to the class upon which it operates.

[fols. 83-108] IV

The Ordinance is beyond the grant of power authorized by the Cities and Villages Act.

V

The Illinois Truck Act repealed the right of the City to tax, license and regulate the business of Carters.

[fol. 109] IN THE SUPREME COURT OF ILLINOIS, NOVEMBER TERM, A. D. 1949

CITY OF CHICAGO, a Municipal Corporation, Appellant,

vs.

THE WILLETT COMPANY, an Illinois Corporation, Appellee

Appeal from Municipal Court of Chicago. Honorable R. P. Drymalski, Judge, Presiding

EXCERPTS FROM REPLY BRIEF FOR APPELLANT—Filed March 18, 1950

[fols. 110-111] I

Since the ordinance is suspectible of a proper and reasonable construction which will render it valid, defendant's insistence that it should be given an unconstitutional construction is unwarranted.

[fol. 112] II

Being confined to purely intracity cartage, the ordinance here neither interferes with nor burdens interstate commerce. Nor is defendant's claim of inseparability between its intracity, intercity and interstate operations to any extent sustained by the evidence.

[fol. 113] However, the defendant cannot insist on continuing in the intracity cartage business and still refuse to [fol. 114] pay the occupation tax levied by the city ordinance upon such business. Nor can it escape such tax by the simple device of using the same vehicles indiscriminately for intracity, intercity and interstate business, and then claiming that it cannot unscramble or disassociate one type of business from the other, without offering any evidence that it cannot, or that it even attempted to do so.

Moreover, inseparability alone is not enough to invalidate a local revenue measure. There must be shown, in addition, that the imposition of the tax actually results in an

undue burden upon interstate commerce. In this connection we quote from *Pacific Telephone and Telegraph Co.* v. *Washington Tax Commission*, 297 U. S. 403, (pp. 415-16):

> "No decision of this Court lends support to the proposition that an occupation tax upon local business, otherwise valid, must be held void merely because the local and interstate branches are for some reason inseparable."

In other words, even a showing of inseparability, without proof that it actually imposes an undue burden upon interstate commerce, is not sufficient. Certainly, a mere claim of inseparability is not enough. And it is not even claimed, much less shown, that the small license fee imposed by the ordinance is either unreasonable, burdensome, oppressive or confiscatory.

[fol. 115] III

The carters ordinance satisfies the constitutional requirement of uniformity as to the class upon which it operates.

[fol. 116] IV

The ordinance is within the express grant of statutory power to municipalities "to license, tax, and regulate * * * carters * * * and to prescribe their compensation."

[fol. 117] V

The Illinois Truck Act of 1939 did not repeal the right of the City to tax the occupation of carters.

[fols. 118-119] IN SUPREME COURT OF ILLINOIS

ARGUMENT AND SUBMISSION—March 21, 1950

Now on this day come the parties hereto and this being one of the days set apart for the call of the docket under the rules of this court, and it appearing to the Court that appellant hath filed herein a duly certified transcript of the record and proceedings of the Court below, together with printed abstracts thereof, and briefs and arguments of

counsel in support of the errors assigned herein, and entered motion to reverse the judgment and remand said cause and for costs, and the said appellee having entered motion to affirm said judgment and for costs and procedendo, and said motions being taken under advisement for final hearing, and the Clerk of this Court reporting that said cause is now ready to be taken, and said cause having been argued orally by Arthur Magid for appellant and by C. D. Snewind for appellee is here submitted for the consideration and judgment of the Court:

Therefore it is ordered by the Court that this cause be and the same is hereby taken under advisement.

[fol. 120] IN SUPREME COURT OF ILLINOIS

Docket No. 31312—Agenda 16—March, 1950

The City of Chicago, Appellant, v. The Willett Company, Appellee.

OPINION—May 18, 1950

Mr. JUSTICE FULTON delivered the opinion of the court:

This cause is heard here on direct appeal from a judgment of the municipal court of Chicago, finding the Willett Company, hereinafter referred to as defendant, not guilty in an action brought by the city of Chicago, which charged said defendant with engaging in the business of a carter within the city of Chicago without first having obtained or paid for a license therefor, in violation of chapter 163, Municipal Code of Chicago.

The cause was heard by the court without a jury. The parties filed a stipulation which, with certain testimony of the executive vice-president of the defendant company, constitutes the record in the cause. The trial court has certified that the validity of a municipal ordinance is involved.

Chapter 163 of the Chicago Municipal Code relates to carters and provides, in brief, that any dray type of vehicle driven or employed for the purpose of transporting or conveying property and merchandise within the city for hire or reward shall be deemed a cart within the meaning of the chapter, whether the vehicle be employed or hired from any

public stand, public way, barn, garage, office or other place, or whether it be hired for the day, week, month or year. A license tax is imposed by the ordinance for each cart operated or controlled by every carter according to established fees and schedules.

The foregoing section as passed repeals the prior public carters ordinance as well as the furniture movers ordinance.

The defendant is an Illinois corporation, with its offices in Chicago, and was engaged in the business of transporting property by motor vehicles for hire in the city of Chicago. It operates as a contract carrier of commodities by motor vehicle from points and places within the State of Illinois, to points and places in the States of Indiana and Wisconsin. It further carries property within the city of Chicago from point to point under contract with various firms and other interstate and intrastate carriers entering the city. It holds itself out to serve the public and connecting carriers and forwarding companies generally up to the limit of its capacity, either (a) by leasing trucks with drivers to shippers by the hour, day, week or year or other period, (b) by making contracts with shippers to perform [fol. 121] all trucking for a fixed period, (c) by giving occasional service or handling single shipments in local cartage for any shipper at a rate per hundred pounds, per ton, per piece, or other unit, (d) by distributing pooling cars, and (e) by rendering collection and delivery service, station or substation service, for rail, water and highway motor carriers and forwarding companies, either under contract or on some other basis. It was further stipulated that the motor vehicles operated by the defendant company in the course of a day's business would transport property from points within the city of Chicago to other points within the city of Chicago, from points within the city of Chicago to other points within the State of Illinois outside the city and from points in Chicago to other States surrounding Illinois and return. The defendant did not comply with the provisions of the carters ordinance, arguing that the ordinance was void and of no legal effect because it is in conflict with the constitution of the United States; it is in conflict with the constitution of Illinois; it is in conflict with section 23-51 of the Revised Cities and Villages Act; and it is in conflict with the Illinois Truck Act of 1939, as amended.

The finding of the trial court for the defendant is apparently based on the ground that the application of the ordinance to the defendant carrier's business would create a burden upon interstate commerce and that, therefore, the defendant is exempt from the provisions of the carters ordinance of the city of Chicago.

The argument of the city of Chicago, the appellant here, is to the effect that by the terms of the ordinance, the license fee is restricted to carters doing business "within the city" and that the natural meaning of those words restricts the ordinance to intracity business and it cannot apply to interstate commerce. In support of this construction, appellant cites *Pacific Express Company* v. *Seibert*, 142 U. S. 339, and related cases. It further argues that the mere fact that the defendant company is engaged in interstate commerce, as well as intrastate and intracity, does not prevent the city of Chicago from imposing an occupation tax upon the defendant with respect to the purely intracity operations in which the defendant is admittedly engaged. To support this view, they cite cases such as *Osborne* v. *Florida*, 164 U. S. 650, *Pullman Co.* v. *Adams*, 189 U. S. 420, and like cases.

The defendant, on the other hand, cites *People* v. *Hor-*
[fol. 122] *ton Motor Lines*, 281 N. Y. 196; *Northern Pacific Railway Co.* v. *Washington*, 222 U. S. 370, and *Sprout* v. *South Bend*, 277 U. S. 166, and similar cases for the proposition that the State or municipality cannot tax interstate commerce and, in situations such as the one before the court, the tax violates the constitution of the United States and imposes a burden on interstate commerce. Both parties further argue as to the validity and invalidity of the ordinance in question.

It is the law in this State that this court will give a construction to a statute which will uphold its validity. The presumption is always in favor of the validity of an ordinance passed in pursuance of statutory authority. *City of Chicago* v. *Hebard Express and Van Co.*, 301 Ill. 570.

It seems clear that the ordinance in question is not invalid by its terms, but could be held to be so by reason of its application to certain operators of carts, under the definition of the ordinance, in and around the city of Chicago. In other words, the ordinance is not invalid *per se*. It is only upon its application that a question of its constitutionality can arise. In *Pacific Express Co.* v. *Seibert*,

142 U. S. 339, it was said, " 'Business done within this State' cannot be made to mean business done between that State and other States. We, therefore, concur in the view of the court below that it was not the legislative intention, in the enactment of this statute, to impinge upon interstate commerce, or to interfere with it in any way whatever; and that the statute, when fairly construed, does not in any manner interfere with interstate commerce." Thus, we find that the ordinance in question here, when construed in the light of the above language, is invalid only when it is applied to interstate commerce in its fullest sense.

As contended by the city, there is no question but what a license tax may be imposed upon the defendant for its intracity business. In *Osborne v. Florida,* 164 U. S. 650, a Florida statute was involved, imposing an annual license tax on all express companies doing business in the State. The Supreme Court of Florida has construed the statute as not applying to interstate business, but only to local business, intrastate in character. The Supreme Court of Florida held the statute to be valid and the United States Supreme Court affirmed this holding, pointing out that the construction of the statute by the Supreme Court of Florida, as applying only to intrastate business, was binding upon it and would be accepted by it. The case is authority for [fol. 123] the rule that a statute so construed does not exempt the express company from taxation upon its business which is solely within the State, even though at the same time the same company may do a business which is interstate in character.

However, the mere operation of trucks by the defendant "within the city" is not sufficient to determine the issues here. The legal effect of such operation must be considered.

As we have previously stated, the question here is one of application of the ordinance to the practical aspects of the hauling done by the defendant. In addition to arguing that the statute itself provides only for taxation upon persons transporting property "within the city" and that this deals only with intrastate business, the city of Chicago admits that where the intracity and interstate operations are inseparable, and the defendant cannot separate the two, nor continue to engage in business if separation is attempted, the argument as to the tax being a burden upon interstate commerce might apply.

It is only when a separation, in fact, of intrastate and interstate business exists that a like separation may be recognized between the control of the State and that of the nation. (See *Osborne* v. *Florida*, 164 U. S. 650, and *Pullman Co.* v. *Adams*, 189 U. S. 420.) The city argues, however, that no inseparability has been shown and that the defendant has not met the burden of proof in this regard. The burden is on him who asserts that, although actually within, the traffic is legally outside the State; unless the interstate character is established, locality determines the question of jurisdiction. *Pennsylvania Railroad Co.* v. *Knight*, 192 U. S. 21.

The only evidence in this record is that of Howard L. Willett, Jr., who is the executive vice-president of the defendant company, and who stated on the stand that his company engaged in interstate, intrastate and local freight in the city of Chicago. It is not clear from the testimony or the questions asked of Willett whether or not he was familiar with the legal meaning of the term "intercity freight." It is apparent that the Willett Company operates from Chicago to surrounding States and in that manner engages in interstate commerce. They also engage as a contract carrier with other carriers coming into the city of Chicago from outside the State of Illinois. Whether or not by intercity operation Willett meant only that his trucks operated within the city of Chicago is another thing. The [fol. 124] record is silent on that point.

He did testify that it was not possible to separate the intrastate freight from the interstate freight and the intercity freight hauled by the defendant. He further stated that defendant could not keep records of the shipments it made each day within the city of Chicago as to interstate, intracity or intrastate character.

It appears, insofar as we can ascertain from this record, that the defendant herein operates its trucks under contract with large industries, and, in the main, with other interstate carriers bringing property into the city of Chicago. The defendant itself does not determine what articles it shall carry on its trucks, but carries articles of all kinds, in interstate, intrastate and intracity traffic. It has no basis for differentiating between the shipments which it carries on its trucks, but carries what is given it by the contractor, retailer or carrier with whom it is dealing, and on every

load the three types of property are so intermingled as to be impossible of separation. It is apparent from these statements that the type of business done by the defendant herein is not one generally considered to be within the meaning of a carter's ordinance. The defendant does not keep records of the shipments because he does not handle the shipments as such. He does not go from house to house picking up shipments for delivery within the city of Chicago, but his entire business is concerned with hauling under contract for various firms, enterprises and other contract carriers in the city of Chicago.

The cross-examination by the city of Chicago did not counteract the statements of this witness, and his statements as to nonseparability remained unchallenged in the record. All of the trucks, over 1200 of them, are engaged in the type of work which has been described. It was evident that the type of contracts the defendant has with other companies deal mainly with other carriers. The defendant has contracts with the Pennsylvania Railroad, Acme Fast Freight, Air Cargo, Ryerson Steel, U. S. Steel, Youngstown Steel, H. J. Heinz Company, Standard Brands Company, Glidden Company and others of that nature. All of these companies have either offices or plants in the city of Chicago.

On cross-examination the witness testified that insofar as the operations of the defendant were concerned, there was no possible way in which they could determine the proportion of local transportation as compared to intra-[fol. 125] state and interstate, but he did state that in all the operations, every truck had some of all types of freight on it.

In view of the uncontradicted testimony in the record, it would appear that the defendant is not able to separate its intracity business from its interstate business, nor can it keep records of such business, nor can it continue in any one of the operations without giving up its entire business. In other words, it needs all of its business to keep in operation.

In *Pullman Co.* v. *Adams*, 189 U. S. 420, a Mississippi statute was involved, imposing a privilege tax on each sleeping-car company carrying passengers from one point to another within the State. The proof showed that the defendant company carried passengers into Mississippi

from points outside the State, or out of Mississippi from points within the State, but that the same cars also carried passengers from point to point within the State. It was contended that the tax was invalid as a burden upon interstate commerce. The United States Supreme Court affirmed the judgment of the State court, holding the tax valid, saying that the defendant had the right to choose between what points it would carry persons, and, therefore, the right to give up the carriage of passengers from one point to another within the State. The court further said, "The company cannot complain of being taxed for the privilege of doing a local business which it is free to renounce." The distinguishing factor in that case and in the situation before us is that the record is clear and uncontroverted that the defendant herein is not free to renounce. The record is uncontradicted that the defendant cannot engage in any one portion of its business without the other.

In *Sprout* v. *South Bend*, 277 U. S. 166, the Supreme Court of the United States, considering an ordinance of the city of South Bend imposing a license on motor busses, stated, "But in order that the fee or tax shall be valid, it must appear that it is imposed solely on account of the intrastate business; that the amount exacted is not increased because of the interstate business done; that one engaged exclusively in interstate commerce would not be subject to the imposition; and that the person taxed could discontinue the intrastate business without withdrawing also from the interstate business." The evidence in the instant cause makes this language applicable to the case here.

The case is similar in some respects to *People* v. *Horton* [fol. 126] *Motor Lines, Inc.*, 281 N. Y. 196, 22 N. E. 2d 338. That case involved an interstate motor carrier which operated a fleet of trucks within the city of New York to deliver and pick up freight to and from its New York terminal or to other shippers within the city. The question involved was whether the public carters ordinance could be applied to the defendant's small trucks which engaged primarily in interstate commerce, although all operated "within the city." In determining that the defendant was not subject to the carters ordinance, the court cited *Northern Pacific Railway Co.* v. *Washington ex rel. Atkinson*, 222 U. S. 370. In that case it was said, "The train, although moving from

one point to another in the State of Washington, was hauling merchandise from points outside of the State destined to points within the State and from points within the State to points in British Columbia, as well as in carrying merchandise which had originated outside the State and was in transit through the State to a foreign destination. This transportation was interstate commerce; and the train was an interstate train."

The language of this last cited case is applicable here. While the defendant may have intracity loads in part upon its trucks, it is clear that every load combines intrastate and interstate property as well. The incidental carrying of loads within the city does not make the defendant subject to the license tax here. The defendant cannot separate its loads, nor can it discontinue any part of the service. Under these facts, we must conclude that the defendant is engaged in interstate commerce within the meaning of that term and is not subject to the license tax here in question.

Under the view we have taken in this cause, it is not necessary to consider the other arguments made by the appellant and appellee. For the reasons stated herein, the judgment of the municipal court of the city of Chicago is affirmed.

Judgment affirmed.

Thompson, C. J., and Crampton, J., dissenting.

[fols. 127-128] In Supreme Court of Illinois

No. 31312

City of Chicago, a Municipal Corporation, Appellant,

vs.

The Willett Company, an Illinois Corporation, Appellee

Judgment—May 18, 1950

And now, on this day, this cause having been argued by counsel, and the Court, having diligently examined and inspected as well the record and proceedings aforesaid, as matters and things therein assigned for error, and now, being sufficiently advised of and concerning the premises for that it appears to the Court now here, that neither in the

record and proceedings aforesaid, nor in the rendition of the judgment aforesaid, is there anything erroneous, vicious or defective, and in that record there is no error.

Therefore, it is considered by the Court that the judgment of the Municipal Court of the City of Chicago aforesaid, Be Affirmed in All Things and Stand in Full Force and Effect, notwithstanding the said matter and things therein assigned for error. And it is further considered by the Court that the said appellee recover of and from the said appellant Costs by it in this behalf expended, to be taxed, in due course of law.

I, Earle Benjamin Searcy, Clerk of the Supreme Court of the State of Illinois and keeper of the records, files and Seal thereof, do hereby certify that the foregoing is a true copy of the final order of the said Supreme Court in the above entitled cause of record in my office.

In Witness Whereof, I have hereunto subscribed my name and affixed the Seal of said court this 27th day of September, 1950.

(S.) Earle Benjamin Searcy, Clerk, Supreme Court of the State of Illinois. (Seal.)

[fol. 129] In the Supreme Court of Illinois, November Term, A. D. 1949

City of Chicago, a Municipal Corporation, Appellant,

vs.

The Willett Company, an Illinois Corporation, Appellee

Appeal from Municipal Court of Chicago. Honorable R. P. Drymalski, Judge Presiding

Excerpts from Petition for Rehearing—Filed June 7, 1950

[fol. 130] 5

The opinion (pp. 5-6) treats the fact that appellee also carried freight for interstate shippers and railroads upon the same trucks that it carried purely intracity shipments as showing nonseparability between the two types of commerce.

Another controlling point which the court overlooked is that proof of nonseparability alone is insufficient to prevent application of the ordinance to appellee; it must further be shown that the tax levied by the ordinance does in fact impose an undue burden upon appellee's interstate business.

[fols. 132-133] In Supreme Court of Illinois

[Title omitted]

Order Denying Rehearing—September 18, 1950

And now, on this day, the Court having duly considered the petition for rehearing filed herein, and being now fully advised of and concerning the premises, doth overrule the prayer of the petition and denies a rehearing in this cause.

[fol. 134] In the Supreme Court of Illinois, November Term, A. D. 1949

[Title omitted]

Notice of Motion

To: Daley & Lynch, Rm. 1631, 33 N. LaSalle St., Chicago, Illinois, Attorney for Appellee:

Kindly take notice that we shall file with the Clerk of the Supreme Court in the above entitled cause for due presentation to the said court, our Petition to Recall and Stay the Mandate issued by said court on the judgment of affirmance entered in this cause, pending the final disposition by the Supreme Court of the United States of a petition for a writ of certiorari which we intend to file in due course to obtain a review by the Supreme Court of the United States of the said judgment of affirmance entered by the Supreme Court of Illinois in the above entitled cause; and that we shall further file with the Clerk of the Supreme Court of Illinois a certain Praecipe for Record;

copies of which Petition and Praecipe are hereto attached and herewith served upon you.

(s) John J. Mortimer, Acting Corporation Counsel of the City of Chicago, 511 City Hall, Chicago 2, Illinois.

Received a copy of the above and foregoing Notice, together with copies of the Petition and Praecipe therein referred to, this —— day of November 1950

—— ——, Attorney for Appellee.

[fol. 135] IN THE SUPREME COURT OF ILLINOIS,
NOVEMBER TERM, A. D. 1949

[Title omitted]

PETITION FOR RECALL AND STAY OF MANDATE PENDING DISPOSITION OF PETITION TO UNITED STATES SUPREME COURT FOR WRIT OF CERTIORARI—Filed November 29, 1950

Now comes City of Chicago, a municipal corporation, appellant in the above entitled cause, by John J. Mortimer, Acting Corporation Counsel of the City of Chicago, its attorney, and represents unto this Honorable Court as follows:

1. That on May 18, 1950, this court rendered its decision and filed its opinion in the above cause, affirming the judgment of the Municipal Court of Chicago, and holding that Chapter 163, Municipal Code of Chicago (otherwise known as the Carters Ordinance) was violative of the commerce clause of the Federal Constitution, and was therefore void as applied to appellee's business.

2. That on September 18, 1950, this court denied appellant's petition for a rehearing.

3. That, thereafter, the mandate of this court duly issued on said judgment of affirmance.

4. That appellant intends to file in due course a Petition in the Supreme Court of the United States for a writ of certiorari to review the said judgment of this court.

[fol. 135a] 5. Wherefore, appellant prays that this court recall its said mandate heretofore issued on its said judgment as aforesaid, and that this court stay said mandate

until the final disposition by the Supreme Court of the United States of said Petition for a writ of certiorari.

City of Chicago, a municipal corporation, Appellant, by John J. Mortimer, Acting Corporation Counsel of the City of Chicago, its Attorney.

Duly sworn to by Arthur Magid, jurat omitted in printing.

[fol. 136] IN SUPREME COURT OF ILLINOIS

[Title omitted]

ORDER RECALLING AND STAYING MANDATE—November 30, 1950

And now, on this day, the Court having duly considered the motion by appellant for recall of mandate, and that the same be stayed until final disposition of the writ of certiorari to be filed in the United States Supreme Court, and being now fully advised of and concerning the premises doth allow said motion.

[fol. 137] IN THE SUPREME COURT OF ILLINOIS, NOVEMBER TERM, A. D. 1949

[Title omitted]

PRAECIPE FOR RECORD

To the Honorable Clerk of the Supreme Court of Illinois:

Kindly prepare and certify, for purpose of obtaining a review by the Supreme Court of the United States, the complete record in the above entitled cause, including, but not limited to, the following:

1. Abstract of Record.
2. Brief and Argument for Appellant.
3. Brief and Argument for Appellee.
4. Reply Brief for Appellant.
5. Judgment entered by this court on May 18, 1950, affirming judgment of trial court.
6. Opinion filed by this court on May 18, 1950.

7. Petition for Rehearing.

8. Order entered September 18, 1950, denying Petition for Rehearing.

9. Petition for Recall and stay of Mandate.

10. Order entered on said Petition for Recall and stay of Mandate.

[fol. 138] 11. All other proceedings had and orders entered in the above entitled cause.

12. Certificate of the clerk of this court to the complete record in this cause.

John J. Mortimer, Acting Corporation Counsel of the City of Chicago, Attorney for Appellant.

[fol. 139] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 140] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1950

No. —

CITY OF CHICAGO, a Municipal Corporation, Petitioner,

vs.

THE WILLETT COMPANY, an Illinois Corporation

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

Upon Consideration of the application of counsel for petitioner,

It Is Ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including January 16", 1951.

Fred M. Vinson, Chief Justice of the United States.

Dated this 15" day of December, 1950.

[fol. 141] IN THE SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, A. D. 1950

[Title omitted]

STIPULATION TO PRINT CERTAIN PORTIONS OF THE RECORD—Filed December 26, 1950

It is hereby stipulated by and between the parties hereto, by and through their respective attorneys, pursuant to paragraph 8 of Rule 38 of the Supreme Court of the United States, that the Printed Transcript of the Record should contain all of the matter included in the Certified Transcript of the Record, except as follows:

[fol. 142] From the "Brief and Argument for Appellant", print only the following:

(Cover Page) Print the cover page, except the names of counsel.

(Pages 10-12) Print from "(4) The Issues and the Decision Thereon", on page 10, through the end of page 12.

(Pages 13-18) Print the caption "Points and Authorities", on page 13, and all the main headings (Points I to VII, both inclusive, on pages 13 to 18). Omit all sub-headings and all the citations.

From the "Brief and Argument for Appellee", print only the following:

(Cover Page) Print the cover page, except the names of counsel.

(Pages 3-4) Print from "Defendant's Theory of the Case", on page 3, through the end of page 4.

(Pages 5-6) Print the caption "Points and Authorities," on page 5, and all the main headings (Points I to V, both inclusive, on pages 5 and 6). Omit all the citations.

From the "Reply Brief for Appellant", print only the following:

(Cover Page) Print the cover page, except the names of counsel.

(Page 2) Print the heading appearing in bold face type on page 2.

(Page 6) Print the heading

[fol. 143] (Pages 12-13) Print from the last incomplete paragraph on page 12, beginning with the word "However", through to the end of the next to the last paragraph on page 13, ending with the word "confiscatory".

(Pages 14, 18 and 20) Print the headings appearing in bold face type on pages 14, 18 and 20.

From the "Petition for Rehearing", print only the following:

(Cover Page) Print the cover page, except the names of counsel.

(Page 4) "The opinion (pp. 5-6) treats the fact that appellee also carried freight for interstate shippers and railroads upon the same trucks that it carried purely intra-city shipments as showing nonseparability between the two types of commerce."

(Page 7) "Another controlling point which the court overlooked is that proof of nonseparability alone is insufficient to prevent application of the ordinance to appellee; it must further be shown that the tax levied by the ordinance does in fact impose an undue burden upon appellee's interstate business."

[fols. 144-145] Except as above stated, the Certified Transcript of the Record, shall be printed in full.

John J. Mortimer, Corporation Counsel of the City of Chicago, a Municipal Corporation; L. Louis Karton, Head of Appeals and Review Division, Assistant Corporation Counsel; Arthur Magid, Assistant Corporation Counsel, 511 City Hall, Chicago 2, Illinois, Attorneys for the Petitioner. Richard J. Daley, By Charles D. Snewind; William J. Lynch, Jr., By Charles D. Snewind; Charles D. Snewind, Attorneys for the Respondent.

[fol. 1] UNITED STATES OF AMERICA

STATE OF ILLINOIS,
Supreme Court, ss:

At a Term of the Supreme Court, begun and held in Springfield, on Monday, the fourteenth day of May in the year of our Lord, one thousand nine hundred and fifty-one, within and for the State of Illinois.

Present: Jesse L. Simpson, Chief Justice; Justice Walter T. Gunn, Justice Charles H. Thompson, Justice Albert M. Crampton, Justice William J. Fulton, Justice Joseph E. Daily, Justice Walter V. Schaefer; Ivan A. Elliott, Attorney General; Harry G. Newman, Marshal.

Attest: Earle Benjamin Searcy, Clerk.

Be it remembered, that, to-wit: on the 31st day of May, A. D. 1951, the same being one of the days in vacation after the Term of Court aforesaid, there was filed in the Office of the Clerk of the Supreme Court of the State of Illinois a certain mandate from the United States Supreme Court wherein the judgment of this Court was vacated, and this cause remanded to the Supreme Court of Illinois for clarification, in a cause entitled in this Court: No. 31312, City of Chicago, a municipal corporation, Appellant, vs. The Willett Company, an Illinois corporation, Appellee, Appeal from Municipal Court, City of Chicago, 49MC 131413, which mandate is in the words and figures following, to-wit:

[fol. 2] UNITED STATES OF AMERICA, ss:

The President of the United States of America

To the Honorable the Judges of the Supreme Court of the State of Illinois, Greeting:

Whereas, lately in the Supreme Court of the State of Illinois, before you, or some of you, in a cause between City of Chicago, a Municipal Corporation, Appellant, and The Willett Company, an Illinois Corporation, Appellee, No. 31312, wherein the judgment of the said Supreme Court, entered in said cause on 18th day of May, A. D. 1950, was in favor of the said appellee, Willett Company, and against

the said appellant; as by the inspection of the transcript of the record of the said Supreme Court, which was brought into the Supreme Court of the United States by virtue of a writ of certiorari, agreeably to the Act of Congress, in such case made and provided, fully and at large appears.

And whereas, in the present term of October, in the year of our Lord one thousand nine hundred and fifty, the said cause came on to be heard before the Supreme Court of the United States on the said transcript of record and was duly submitted:

On consideration whereof, it is ordered and adjudged by this Court that the judgment of the said Supreme Court, in this cause be, and the same is hereby vacated without costs.

It is further ordered that this cause, be, and the same is hereby, remanded to the Supreme Court of Illinois for [fol. 3] clarification by that court to show, in the light of Minnesota v. National Tea Co., 309 U. S. 551, whether the judgment herein rests on an adequate and independent state ground or whether decision of a federal question was necessary to the judgment rendered.

April 23, 1951.

And the same is hereby remanded to you, the said judges of the said Supreme Court of the State of Illinois, in order that such proceedings may be had in the said cause, in conformity with the judgment and decree of this Court above stated, as according to right and justice, and the Constitution and laws of the United States, ought to be had therein, the said writ of certiorari notwithstanding.

Witness the Honorable Fred M. Vinson, Chief Justice of the United States the 29th day of May, in the year of our Lord one thousand nine hundred and fifty-one.

Charles Elmore Cropley, Clerk of the Supreme Court of the United States, by Hugh W. Barr, Deputy.

[fol. 4] UNITED STATES OF AMERICA

STATE OF ILLINOIS,
Supreme Court, ss:

At a Term of the Supreme Court, begun and held in Springfield, on Monday, the twelfth day of November in the year of our Lord, one thousand nine hundred and fifty-one, within and for the State of Illinois.

Present: Joseph E. Daily, Chief Justice; Justice William J. Fulton, Justice Walter V. Schaefer, Justice Ralph L. Maxwell, Justice Albert M. Crampton, Justice George W. Bristow, Justice Harry B. Hershey; Ivan A. Elliott, Attorney General; Harry G. Newman, Marshal.
Attest: Earle Benjamin Searcy, Clerk.

Be it remembered, that afterwards, to-wit: on the 17th day of December, A. D. 1951, the same being one of the days in vacation after the Term of Court aforesaid, the opinion of the Court was filed in said cause and entered of record in the words and figures following, to-wit:

No. 31312.

CITY OF CHICAGO, a Municipal Corporation, Appellant,

vs.

THE WILLETT COMPANY, an Illinois Corporation, Appellee

Appeal from Municipal Court, City of Chicago

[fol. 5] Docket No. 31312.

The City of Chicago, Appellant, v. The Willett Company, Appellee

Mr. Justice FULTON delivered the opinion of the court:

Pursuant to the order entered by the United States Supreme Court in the cause of *City of Chicago* v. *The Willett Co.* (No. 493, October term, 1950, of said court,) requesting a clarification of our opinion in the same cause, reported

in 406 Ill. 286, as to whether or not a decision of a Federal question was necessary, the basis for the opinion in said cause is as follows:

Osborne v. *Florida*, 164 U. S. 650, and *Pullman Co.* v. *Adams*, 189 U. S. 420, hold that only when a separation, in fact, of intrastate and interstate business exists a like separation may be recognized between the control of the State and that of the nation to apply a tax such as proposed here. The burden of proving inseparability is on him who asserts that, although actually within, the traffic is legally outside the State; that unless the interstate character is established, locality determines the question of jurisdiction. (*Pennsylvania Railroad Co.* v. *Knight*, 192 U. S. 21.) *Sprout* v. *South Bend*, 277 U. S. 166, holds that in order that the fee or tax be valid it must appear that it is imposed solely on account of the intrastate business; that the amount exacted does not increase because of the interstate business done; and that the person taxed could discontinue the intrastate business without withdrawing also from the interstate business.

The sole evidence in the cause, to which fact situation the above rules of law had to be applied, was to the effect that the Willett Company is not able to separate intrastate from interstate and inter-city business, nor can it keep records of such business or degrees of business, nor can it continue in any one of its operations without giving up its entire business. The city did not contradict, oppose or challenge this evidence either by introducing evidence in opposition thereto or by cross-examining the witnesses to challenge their veracity.

Our decision is that the Chicago carters ordinance is valid, but, in light of the rules of the foregoing cases, could not be applied to the Willett Company because of the uncontradicted evidence which removes the Willett Company from an application of the license tax.

The judgment of the municipal court of the city of Chicago is affirmed.

Judgment affirmed.

[fol. 6] UNITED STATES OF AMERICA

STATE OF ILLINOIS,
Supreme Court, ss:

At a Term of the Supreme Court, begun and held in Springfield, on Monday, the twelfth day of November in the year of our Lord, one thousand nine hundred and fifty-one, within and for the State of Illinois.

Present: Joseph E. Daily, Chief Justice; Justice William J. Fulton, Justice Walter V. Schaefer, Justice Ralph L. Maxwell, Justice Albert M. Crampton, Justice George W. Bristow, Justice Harry B. Hershey; Ivan A. Elliott, Attorney General; Harry G. Newman, Marshal.
Attest: Earle Benjamin Searcy, Clerk.

Be It Remembered, that to-wit: on the 17th day of December 1951 the same being one of the days in vacation after the term of Court aforesaid, the following proceedings were, by said court, had and entered of record, to-wit:

No. 31312

CITY OF CHICAGO, a Municipal Corporation, Appellant

vs.

THE WILLETT COMPANY, an Illinois Corporation, Appellee

Appeal from Municipal Court, City of Chicago, 49MC 131413

And now, on this day, this cause having been argued by counsel, and the Court, having diligently examined and inspected as well the record and proceedings aforesaid, as matters and things therein assigned for error, and now, being sufficiently advised of and concerning the premises for that it appears to the Court now here, that neither in the record and proceedings aforesaid, nor in the rendition of the judgment aforesaid, is there anything erroneous, vicious or defective, and in that record there is no error.

Therefore, it is considered by the Court that the judgment of the Municipal Court of the City of Chicago aforesaid, Be Affirmed In All Things and Stand In Full Force and

Effect, notwithstanding the said matter and things therein assigned for error. And it is further considered by the Court that the said appellee recover of and from the said appellant Costs by it in this behalf expended, to be taxed, in due course of law.

I, Earle Benjamin Searcy, Clerk of the Supreme Court of the State of Illinois and keeper of the records, files and Seal thereof, do hereby certify that the foregoing is a true copy of the final order of the said Supreme Court in the above entitled cause of record in my office.

In Witness Whereof, I have hereunto subscribed my name and affixed the Seal of said court this day of ———, 19——.

—— ——, Clerk, Supreme Court of the State of Illinois.

[fol. 7] And afterwards, to-wit: on the 3rd day of January, A.D. 1951, the same being one of the days in vacation after the Term of Court aforesaid, there was filed in the Office of the Clerk of the Supreme Court a certain notice, petition and order entered by Justice Walter V. Schaefer staying mandate pending the final disposition by the Supreme Court of the United States of the petition for a writ of certiorari proposed to be filed by the appellant to obtain a review of said judgment of December 17, 1951; together with praecipe for record, which documents are in the words and figures following, to-wit:

[fol. 8] [Stamp:] Filed Jan. 3, 1952. Earle Benjamin Searcy, Clerk.

No. 31312

In the Supreme Court of Illinois, November Term, A. D. 1949

City of Chicago, a Municipal Corporation, Appellant,

vs.

The Willett Company, an Illinois corporation, Appellee

Appeal from Municipal Court of Chicago

Honorable R. P. Drymalski, Judge Presiding

Notice

To: Daley & Lynch, Rm. 1631, 33 N. LaSalle St., Chicago, Illinois, Charles D. Snewind, Suite 1410 69 W. Washington St., Chicago, Illinois, Attorneys for Appellee.

Kindly take notice that we shall file with the Clerk of the Supreme Court in the above entitled cause for due presentation to the said court, our Petition to Stay the issuance of the Mandate of said court on the judgment of affirmance entered in this cause on December 17, 1951, pending the final disposition by the Supreme Court of the United States of a petition for a writ of certiorari which we intend to file in due course to obtain a review by the Supreme Court of the United States of the said judgment of affirmance entered on December 17, 1951, by the Supreme Court of Illinois in the above entitled cause; and that we shall further file with the Clerk of the Supreme Court of Illinois a certain Praecipe for Record; copies of which Petition and Praecipe are hereto attached and herewith served upon you.

John J. Mortimer, Corporation Counsel of the City of Chicago, 511 City Hall, Chicago 2, Illinois.

Received a copy of the above and foregoing Notice, together with copies of the Petition and Praecipe therein referred to, this 26 day of December 1951.

Daley & Lynch, by Maran. Charles D. Snewind, Attorneys for Appellee.

[fol. 9] No. 31312

IN THE SUPREME COURT OF ILLINOIS, NOVEMBER TERM, A. D. 1951

CITY OF CHICAGO, a Municipal Corporation, Appellant,

vs.

THE WILLETT COMPANY, an Illinois Corporation, Appellee.

Appeal from Municipal Court of Chicago

Honorable R. P. Drymalski, Judge Presiding.

PETITION FOR STAY OF MANDATE PENDING DISPOSITION OF PETITION TO UNITED STATES SUPREME COURT FOR WRIT OF CERTIORARI

Now comes City of Chicago, a Municipal Corporation, appellant in the above entitled cause, by John J. Mortimer, Corporation Counsel of the City of Chicago, its attorney, and represents unto this Honorable Court as follows:

1. That on December 17, 1951, this court rendered its decision and filed its opinion in the above cause, affirming the judgment of the Municipal Court of Chicago, and holding that Chapter 163, Municipal Code of Chicago (otherwise known as the Carters Ordinance) was violative of the commerce clause of the Federal Constitution, and was therefore void as applied to appellee's business.

2. That appellant intends to file in due course a Petition in the Supreme Court of the United States for a writ of certiorari to review the said judgment of this court.

Wherefore, appellant prays that this court stay the issuance of its said mandate on its said judgment of December 17, 1951 until the final disposition by the Supreme Court of [fol. 10] the United States of said Petition for a writ of certiorari.

City of Chicago, a Municipal Corporation, Appellant,
by John J. Mortimer, Corporation Counsel of the City of Chicago, Its Attorney.

State of Illinois,
County of Cook, ss.:

Arthur Magid, being first duly sworn, upon his oath deposes and says that he is an Assistant Corporation Counsel of the City of Chicago, appellant herein, and is duly authorized to make this verification on behalf of said appellant; that he has read the above and foregoing Petition; that he knows the contents thereof; and that the same are true in substance and in fact.

Arthur Magid.

Subscribed and Sworn to before me, a Notary Public, this 20 day of December, 1951.

Edward R. Hartigan, Notary Public (Seal).

[fol. 11] No. 31312

In the Supreme Court of Illinois, November Term, A. D. 1949

City of Chicago, a Municipal Corporation, Appellant,

vs.

The Willett Company, an Illinois Corporation, Appellee

Appeal from Municipal Court of Chicago

Honorable R. P. Drymalski, Judge Presiding

Order

This cause coming on to be heard before me, a Justice of the Supreme Court of Illinois, in vacation after the November, 1951, Term of this Court, on the petition of the appellant to stay the mandate of this Court on the judgment entered herein on December 17, 1951, pending the final disposition by the Supreme Court of the United States of appellant's proposed petition for a writ of certiorari, and appellee having had due notice of the filing of said petition for stay of mandate, and said petition having been duly considered by me, and being fully advised in the premises;

It is hereby ordered that the mandate of this Court on said judgment of December 17, 1951, be and is hereby stayed pending the final disposition by the Supreme Court of the United States of the petition for a writ of certiorari proposed to be filed by the appellant to obtain a review of said judgment of December 17, 1951.

Enter: Walter V. Schaefer, Justice.

Dated January 2, 1952.

[fol. 12] No. 31312

IN THE SUPREME COURT OF ILLINOIS, NOVEMBER TERM, A. D. 1949

CITY OF CHICAGO, a Municipal Corporation, Appellant,

vs.

THE WILLETT COMPANY, an Illinois Corporation, Appellee

Appeal from Municipal Court of Chicago

Honorable R. P. Drymalski, Judge Presiding.

PRAECIPE FOR RECORD

To the Honorable Clerk of the Supreme Court of Illinois:

Kindly prepare and certify, for the purpose of obtaining a review by the Supreme Court of the United States, the complete record in the above entitled cause commencing with the Mandate issued by the Supreme Court of the United States pursuant to its order granting certiorari in this cause, including, but not limited to the following:

1. Mandate of the Supreme Court of the United States.

2. Clarifying opinion of this Court rendered and filed on December 17, 1951.

3. Judgment order entered on December 17, 1951, affirming the judgment of the Municipal Court of the City of Chicago.

4. Notice to attorneys for appellee of filing the Petition for Stay of Mandate and Praecipe for Record, with Proof of Service of said Notice, Petition and Praecipe.

5. Petition for Stay of Mandate.

[fol. 13] 6. Order entered on said Petition for Stay of Mandate.

7. Praecipe for Record.

8. All other proceedings had and orders entered in the above entitled cause subsequent to the receipt of the Mandate issued out of the Supreme Court of the United States.

9. Certificate of the Clerk of this Court to the Transcript of the Record.

John J. Mortimer, Corporation Counsel of the City of Chicago, Attorney for Appellant.

[fol. 14] UNITED STATES OF AMERICA

STATE OF ILLINOIS,
Supreme Court, ss:

I, Earle Benjamin Searcy, Clerk of the Supreme Court of the State of Illinois, and keeper of the records and Seal thereof, do hereby certify the foregoing to be a true copy of proceedings of this Court since the filing of the mandate of the United States Supreme Court in a certain cause entitled: No. 31312, City of Chicago, a municipal corporation, Appellant, vs. The Willett Company, an Illinois corporation, Appellee, Appeal from Municipal Court, City of Chicago, 49MC 131413, filed in this office on the 10th day of September, A.D. 1949.

In Witness Whereof; I have hereunto subscribed my name and affixed the Seal of said court this 4th day of January 1952.

Earle Benjamin Searcy, Clerk, Supreme Court of the State of Illinois. (Seal.)

[fol. 15] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1951

No. 644

THE CITY OF CHICAGO, a Municipal Corporation, Petitioner,

vs.

THE WILLETT COMPANY, an Illinois Corporation

ORDER ALLOWING CERTIORARI—Filed May 5, 1952

The petition herein for a writ of certiorari to the Supreme Court of the State of Illinois is granted. The case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1951

No. 944 23

CITY OF CHICAGO, a Municipal Corporation,
Petitioner,

vs.

THE WILLETT COMPANY, an Illinois Corporation,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

PETITION FOR WRIT OF CERTIORARI.

JOHN J. MORTIMER,
Corporation Counsel of the City of Chicago,

L. LOUIS KARTON,
Head of Appeals and Review Division,

ARTHUR MAGID,
Assistant Corporation Counsel,
Room 511, City Hall,
Chicago 2, Illinois,

Attorneys for Petitioner.

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1951.

No.

CITY OF CHICAGO, a Municipal Corporation,
Petitioner,

vs.

THE WILLETT COMPANY, an Illinois Corporation,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

PETITION FOR WRIT OF CERTIORARI.

City of Chicago, a Municipal Corporation, petitioner herein, prays that a writ of certiorari issue to review the final judgment of the Supreme Court of Illinois entered on December 17, 1951 (R. 41-42).

A previous judgment had been entered on May 18, 1950 (R. 29-30), but, upon certiorari granted by this Court (341 U. S. 913-914, 95 L. ed. 1349-1350), said judgment was vacated and the cause remanded to the Supreme Court of Illinois with directions to clarify whether said judgment rested on an adequate and independent State ground, or

whether the decision of a Federal question was necessary to the judgment rendered (R. 37-38).

Pursuant to the mandate of this Court on its grant of certiorari, the Supreme Court of Illinois, on December 17, 1951, entered a new (although similar) final judgment (R. 41-42), and, on the same day, filed a clarification of the ground or basis of said judgment (R. 39-40).

Opinions Below.

The opinion rendered by the Supreme Court of Illinois, prior to the grant of certiorari by this Court, is included in the Printed Transcript of the Record (R. 22-29); is set forth in full in Appendix A hereto, pp. 29-38; and is officially reported in 406 Ill. 286, 94 N. E. (2d) 195.

The text of the order of this Court granting certiorari, vacating the judgment, and remanding the cause for clarification of the ground of decision, is set forth in Appendix B hereto, p. 38; and is officially reported in 341 U. S. 913-914; 95 L. ed. 1349-1350.

The mandate issued out of this Court upon its grant of certiorari is included in the Printed Transcript of the Record (R. 37-38).

The clarifying opinion rendered and filed by the Supreme Court of Illinois on December 17, 1951, pursuant to the mandate of this Court, also appears in the Printed Transcript of the Record (R. 39-40), and is set forth in Appendix C hereto, pp. 39-40.

SUMMARY AND SHORT STATEMENT OF THE MATTER INVOLVED.

Petitioner seeks a review of the final judgment of the Supreme Court of Illinois (R. 41-42), holding unenforceable as against respondent corporation, on the sole ground of its being obnoxious to the commerce clause of the Federal Constitution (R. 39-40), an ordinance of the City of Chicago levying an occupation tax upon all persons engaged in the transportation of freight by horse-drawn or automotive vehicle for hire or reward within the city (R. 5-7). The amount of the tax ranged, for horse-drawn vehicles, from a minimum of $2.75 annually for each one-horse vehicle to a maximum of $13.75 annually for each six-horse vehicle, and, for automotive vehicles, from a minimum of $8.25 annually for each vehicle of not more than two-ton capacity to a maximum of $16.50 annually for each vehicle exceeding six-ton capacity, and was imposed in respect of each vehicle used or operated in such "within the city" transportation (R. 6).

The ordinance in question is Chapter 163 of the Municipal Code of Chicago, and was enacted by the City Council of the City of Chicago on January 14, 1949 (R. 5-7). Its official text may be found in the Journal of the Proceedings of the City Council of the City of Chicago, Illinois, for January 14, 1949, at page 3679, and its provisions are also set forth *verbatim* in Appendix D hereto, pp. 41-43.

Respondent corporation transports freight by motor vehicle both in interstate and intrastate commerce. Its intrastate operations include both intercity transportation (*i.e.*, to and from points within the City of Chicago from and to points outside the city but within the state), and intracity transportation (*i.e.*, where the points of origin and

destination are both within the corporate limits of the City of Chicago (R. 8). Respondent refused to comply with the ordinance (R. 8.), and petitioner instituted a quasi-criminal action in the Municipal Court of Chicago, charging respondent with engaging in the intracity transportation of freight by motor vehicle without a license, in violation of the ordinance (R. 1). A jury was waived (R. 2), and, upon a trial of the issues by the court without a jury, the respondent was found not guilty and ordered discharged (R. 2). The trial judge certified that the validity of a municipal ordinance was involved (R. 2-3), and a direct appeal was taken by the City of Chicago to the Supreme Court of Illinois (R. 3).

Although the Supreme Court of Illinois construed the ordinance, and the tax prescribed thereby, as limited to purely intracity transportation (R. 25), it nevertheless held the ordinance unenforceable as an impermissible interference with the Federal commerce power on the sole ground that respondent's interstate and intrastate (including intracity) operations were inseparable (R. 29). Inseparability was held to have been established by a showing that respondent's vehicles carried mixed loads (*i.e.*, that the same vehicles carried both interstate and intrastate packages and parcels at the same time for the same or different shippers), and that respondent did not keep separate records of its interstate and intrastate operations or of its respective revenues therefrom (R. 23, 26-27, 29).

Moreover, this factor of "inseparability" was held sufficient, without more, to render the ordinance violative of the commerce clause of the Constitution of the United States, although there was no showing whatever that the tax levied by the ordinance would or did in practical effect impose an undue burden upon respondent's interstate operations (R. 29). Inasmuch as the Supreme Court of Illinois recognized that the burden of proving invalidity of

the ordinance under the commerce clause was upon the respondent (R. 26),—and this is, indeed, the true rule (*Pennsylvania Railroad Co.* v. *Knight*, 192 U. S. 21, 27; 48 L. ed. 325),—the decision of the Supreme Court of Illinois is tantamount to a holding that a showing of undue burden in fact either is not required or flows inexorably from a mere showing of inseparability. This, we respectfully submit, constitutes an erroneous ruling upon an important and substantial Federal question, and brings this case within the certiorari jurisdiction of this court.

Thus far, we have referred only to the opinion rendered by the Supreme Court of Illinois prior to the grant of certiorari by this Court (R. 22-29). The clarifying opinion filed by the Supreme Court of Illinois, pursuant to the mandate of this Court after the grant of certiorari, makes it crystal clear that the decision of a Federal question was necessary to the judgment here sought to be reviewed (R. 39-40).

JURISDICTIONAL STATEMENT.

Subdivision (3) of Section 1257 of Title 28, Judiciary and Judicial Procedure, is relied upon as giving jurisdiction to the Supreme Court of the United States to review the final judgment of the Supreme Court of Illinois in this cause. It reads as follows:

"Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

* * * * * * *

"(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity

is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States. June 25, 1948, c. 646, 62 Stat. 929." (U. S. C. A., Title 28, Sec. 1257 (3).)

A municipal ordinance has been held to be a "State statute" within former Section 344 of Title 28, from which the foregoing provision is derived. (*Jamison* v. *Texas*, 318 U. S. 413, 414; 87 L. ed. 869; *King Mfg. Co.* v. *Augusta*, 277 U. S. 100, 102-114; 72 L. ed. 801.)

It appears from the main opinion of the Supreme Court of Illinois (R. 22-29), that the earlier judgment of that court (R. 29-30) was based upon its holding that the ordinance in question violated the commerce clause of the Federal Constitution and was, therefore, invalid and unenforceable as against the respondent. The opinion stated that, in view of the decision on the interstate commerce question, "it is not necessary to consider the other arguments made" (R. 29).

The supplemental clarifying opinion, which was filed by the Illinois Supreme Court pursuant to this Court's mandate after granting certiorari, expressly declares that the basis for the present judgment is the court's conclusion that the commerce clause of the Federal Constitution prevents a municipal tax, otherwise valid because levied in respect of local commerce only, from being applied to respondent's purely local cartage operations because, and only because, they are inseparably linked with respondent's interstate business (R. 39-40).

The case arose upon the filing of a quasi-criminal complaint by the City of Chicago in the Municipal Court of Chicago charging the respondent with engaging in the occupation of transporting freight by motor vehicle within the city without having first obtained or paid for a license,

in violation of Chapter 163, Municipal Code of Chicago, which is the ordinance involved (R. 1, 14). The cause was heard by the trial court without a jury (R. 2). The parties filed a stipulation (R. 4-10) which, with certain oral testimony of the executive vice president of the respondent company (R. 11-13), constitutes the entire evidence in the case.

It appears from the evidence that the respondent company operates about 1,200 motor vehicles in the transportation of freight in interstate and intrastate (including intracity) commerce (R. 12). It does not use any horse-drawn vehicles in the conduct of its business (R. 8). It operates as a contract carrier of commodities, and serves shippers, connecting carriers and forwarding companies either (a) by leasing its trucks with drivers to shippers by the hour, day, week or year, or other period; (b) by making contracts with shippers to perform all trucking for a fixed period; (c) by giving occasional service or handling single shipments in local cartage for any shipper at a rate per hundred pounds, per ton, per piece, or other unit; (d) by distributing pooling cars; and (e) by rendering collection and delivery service, station or substation service for rail, water and highway motor carriers and forwarding companies either under contract or on some other basis (R. 7).

The stipulation also contains the express factual recital that each vehicle of the respondent, during every single day of the year, carries on it, along with property which never leaves the city, property destined to points outside the city but within the state, as well as property destined to points outside the State (R. 9). [This fact is of crucial significance, because it establishes that the quantum of respondent's local operations is substantial.]

It was further stipulated that the respondent company had not complied with the provisions of the City ordinance in question, and had not secured licenses as provided

therein (R. 8). The stipulation also contains an express reservation by the respondent to object to the ordinance "on the ground that said Ordinance is void and of no legal effect because it is in conflict with the Constitution of the United States" (R. 4).

The executive vice president of respondent company testified that he did not know how much of respondent's operations were interstate, intrastate or intracity; that the company did not keep any records to determine the proportion of interstate as compared to intrastate and intracity operations; and that as far as the entire operations of the company were concerned, there was no way in which it could determine the proportion of intracity as compared to interstate and intrastate transportation (R. 12-13).

The same witness also testified that his company was not able to separate its interstate, intrastate and intracity operations; that it could not "without considerable hardship" withdraw from its interstate business and continue in its intrastate business; and that its interstate, intrastate and intracity business was not divisible (R. 11).

On the foregoing record, the trial court found the defendant not guilty (R. 2), entered final judgment on said finding (R. 2), and issued a certificate that the cause, and the final judgment therein, involved the question of the validity of a city ordinance (R. 2-3).

On direct appeal to the Supreme Court of Illinois, that court entered its earlier final judgment (subsequently vacated by this Court) affirming the judgment of the trial court (R. 29-30).

In view of respondent's admitted violation of the ordinance (R. 8), and of its express reservation of right to object thereto on the ground of its invalidity and unenforceability because in conflict with the Federal Constitu-

tion (R. 4), it follows that the trial court, in finding the defendant not guilty (R. 2) and entering judgment on said finding (R. 2), necessarily determined that the ordinance was violative of the commerce clause of the Federal Constitution. As further evidence and clarification of the ground of its decision, the trial court issued a certificate reciting that there was involved in the cause, and in the final judgment therein, the validity of a municipal ordinance (R. 2-3).

The Supreme Court of Illinois, in its main opinion, took a similar view of the basis of the trial court's decision, saying:

> "The finding of the trial court for the defendant is apparently based on the ground that the application of the ordinance to the defendant carrier's business would create a burden upon interstate commerce and that, therefore, the defendant is exempt from the provisions of the carters ordinance of the city of Chicago" (R. 24).

In the Brief and Argument for Appellant, filed in the Supreme Court of Illinois, petitioner urged, among other errors, the following:

> "(6) The trial court erred in holding as a matter of law that the ordinance in question was in violation of the commerce clause of the Federal Constitution as an interference with or a burden upon interstate commerce" (R. 16).

In the Brief and Argument for Appellee, respondent contended in the Supreme Court of Illinois (a) that the "intrastate, interstate and local" operations of the respondent "cannot be separated and the ordinance is therefore in violation of the commerce clause of the Federal Constitution" (R. 19), and (b) that the ordinance in question "constitutes an interference with, and a burden on Interstate Commerce in violation of the Federal Constitution" (R. 19).

In its Reply Brief, petitioner urged that the ordinance, being confined to purely intracity transportation, neither interfered with nor burdened interstate commerce (R. 20), and, further, that a showing of inseparability between the interstate and intrastate operations of respondent was not sufficient to establish invalidity of the ordinance under the commerce clause of the Federal Constitution, there being no showing whatsoever that the imposition of the tax under the ordinance actually resulted in an undue burden upon respondent's interstate operations (R. 20-21).

In its Petition for Rehearing, petitioner expressly pointed out that the Supreme Court of Illinois had found inseparability to exist upon a mere showing of "mixed loads" (R. 30), and, further, had overlooked the controlling point that proof of inseparability, without more, was insufficient to invalidate the ordinance as violative of the commerce clause of the Federal Constitution, and that its decision was erroneous because there was no proof or even any attempt to show that the tax levied by the ordinance did in fact impose an undue burden upon respondent's interstate business (R. 31).

Upon consideration of our earlier petition for the writ of certiorari, this Court granted certiorari, vacated the judgment of the Supreme Court of Illinois, and requested that court to clarify the ground of its decision by showing whether its judgment rested on an adequate and independent state ground, or whether the decision of a Federal question was necessary to the judgment rendered (R. 37-38; 341 U. S. 913).

Pursuant to this Court's mandate, the Supreme Court of Illinois issued a clarifying opinion (R. 39-40), and again entered final judgment affirming the judgment of the trial court in favor of respondent (R. 41-42). This clarification sets at rest any doubt that might have existed as to the

basis of the earlier judgment of affirmance, because it specifically declares that the local tax levied by the municipal ordinance in question could not be applied as against the respondent because its intrastate and interstate operations were so inextricably intertwined that it could not continue in its interstate business alone if it chose to escape the tax by discontinuing its intrastate operations (R. 40).

Thus, it is respectfully suggested, the question of the validity of the ordinance in question under the commerce clause of the Federal Constitution was squarely involved in the cause, and was properly raised, presented and preserved for review throughout every stage of the proceedings; that, furthermore, the decision of that question by the Supreme Court of Illinois constituted the necessary basis of the final judgment of that court, and is properly before this Court for review on petition for the writ of certiorari.

The question whether or not a state taxing statute (or city ordinance) is in violation of the commerce clause of the Constitution of the United States is a Federal one, and within the review jurisdiction of this Court. (*Pullman's Palace Car Co.* v. *Pennsylvania*, 141 U. S. 18, 21-22, 35 L. ed. 613; *Western Union Telegraph Co.* v. *Alabama State Board of Assessment*, 132 U. S. 472, 33 L. ed. 409.)

Several cases of more recent date in which this Court has assumed jurisdiction to review final judgments of state courts of last resort which have involved the question whether a state taxing statute (or city ordinance) was violative of the commerce clause of the Federal Constitution, are: (*Pacific Telephone and Telegraph Company* v. *Washington Tax Commission*, 297 U. S. 403, 80 L. ed. 760; *Aero Mayflower Transit Co.* v. *Board of R. R. Commrs. of Montana*, 332 U. S. 495, 92 L. ed. 99; *Central Greyhound Lines, Inc.* v. *Mealey*, 334 U. S. 653, 92 L. ed. 1633; *Interstate Oil*

Pipe Line Co. v. *Stone*, 337 U. S. 662, 93 L. ed. 1613; *Capital Greyhound Lines* v. *Brice*, 339 U. S. 542, 94 L. ed. 733; *Spector Motor Service, Inc.* v. *O'Connor*, 340 U. S. 602, 95 L. ed. 573.)

In *Brotherhood of Railroad Trainmen, et al.* v. *Terminal Railroad Association of St. Louis*, 379 Ill. 403 (affirmed in 318 U. S. 1), the Supreme Court of Illinois, said (p. 408):

> "The question whether a statute of the State or an order of the commission acting within the authority conferred upon it by the General Assembly of the State, imposes a direct burden upon interstate commerce, is one of which the Supreme Court of the United States is the final arbiter.".

The jurisdiction of this Court to review the judgment of the Supreme Court of Illinois in that case (which involved the question of the validity of a regulation of the Illinois Commerce Commission) was invoked and sustained in 318 U. S. 1, 87 L. ed. 571.

That the Supreme Court of Illinois construed the ordinance as confined to local transportation and as not intending to tax interstate business (R. 25), does not dissipate the error of that Court's ruling on the substantial Federal question whether the commerce clause of the Federal Constitution stands as a bar to the enforcement of the ordinance against respondent on a mere showing of inseparability without any evidence of undue burden. Nor can the Court's decision properly be regarded as merely embodying a ruling on the question of the sufficiency of the evidence to establish the existence of undue burden, since evidence of inseparability constitutes no evidence of undue burden. The question of the sufficiency of the evidence does not arise upon a total failure of proof. As this Court pointed out in *Pacific Telephone & Telegraph Co.* v. *Washington Tax Commission*, 297 U. S. 403, 80 L. ed. 760, the fact that

the intrastate and interstate phases of a business may be "inextricably intertwined" does not necessarily establish that a local tax upon the former casts an undue burden upon the latter.

In the case at bar, the quantum of respondent's local operations is not so negligible as to condemn the municipal levy as a tax upon interstate commerce disguised as an impost upon local business. On the contrary, each of respondent's vehicles carries some purely local freight "during every single day of the year" (R. 9). The ordinance is not attacked as prescribing a tax unreasonable in amount in the light of the annual volume of respondent's local operations. The ordinance is avowedly and actually limited in its coverage to purely local business, and casts no burden whatever upon interstate commerce because it neither purports to nor does it in fact levy any tax upon respondent's interstate operations. The indivisibility of respondent's intrastate and interstate business constitutes no ground for invoking the commerce clause as a bar to a fair and reasonable tax levied in respect of respondent's purely local business. (*Pacific Telephone & Telegraph Co.* v. *Washington Tax Commission*, 297 U. S. 403, 80 L. ed. 760.)

QUESTIONS PRESENTED.

(1) Whether proof that the same vehicles carry mixed loads (interstate as well as purely local freight) for the same or different shippers at the same time, and that it is inconvenient or impracticable to allocate specific vehicles for each type of operation or to keep separate records of the interstate and intrastate phases of the business or of the revenue derived therefrom is sufficient to establish a true case of "inseparability" under the decisions of this Court.

(2) As a corollary: Can persons engaged both in interstate and intrastate transportation escape local taxation upon their intrastate operations by the simple expedient of having the same vehicles carry such mixed loads for the same or different shippers at the same time, and by failing to keep separate records of their interstate and intrastate business or of the revenue derived therefrom?

(3) Assuming a sufficient showing of impossibility or impracticability of separation between the interstate and intrastate operations of the respondent company, is such inseparability sufficient to invalidate the municipal tax upon respondent's purely local business as an undue burden upon interstate commerce, in the absence of any proof that such local tax does or will actually result in unduly burdening respondent's interstate operations?

(4) Where the quantum of local business is sufficiently substantial, so that the municipal levy is fair and reasonable as applied thereto and not a disguised tax upon the interstate business, may the commerce clause be invoked as a bar to the local impost on the ground that the taxpayer's intrastate and interstate operations are so "inextricably intertwined" that the former can not be discontinued without also discontinuing the latter? Stated otherwise: Is not a fair and reasonable local tax upon local business unobjectionable under the commerce clause no matter how intermingled with the taxpayer's interstate business?

(5) Does a flat annual charge, reasonable in amount, levied in respect of each motor vehicle used by respondent in intrastate freight transportation become an undue burden upon interstate commerce by reason of the fact that the same vehicle is also used for interstate freight transportation, in the absence of any showing as to the relation,

percentagewise, between such flat annual charge and the annual operating revenue from each vehicle so taxed?

(6) Does a local tax, so reasonable in amount as not to constitute an undue burden upon interstate commerce, become obnoxious to the commerce clause of the Federal Constitution merely because such tax is in the form of a flat annual charge in respect of each vehicle used in intrastate commerce instead of measured by a percentage of the gross receipts from such local commerce?

(7) In view of a total absence of evidence of undue burden, should not the cause have been remanded for the taking of proof on that issue or, in the alternative, should not the ordinance have been accorded the presumption of validity and sustained, instead of held invalid on an inadequate record?

(8) In view of the stipulated fact that respondent's intrastate operations are substantial in amount (R. 9), does not the record conclusively establish the validity of the local tax, under the commerce clause, as applied to the respondent, and require a reversal of the judgment below?

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

I.

The decision of the Supreme Court of Illinois that a showing of inseparability between the interstate and intrastate phases of respondent's business was sufficient to invalidate the municipal tax upon its local business as an undue burden upon interstate commerce, without any showing whatever that such local tax actually produced such a result, is not in accord with the applicable decisions of this court.

In *Pacific Telephone and Telegraph Co.* v. *Washington Tax Commission*, 297 U. S. 403, 80 L. ed. 760, this Court sustained the validity of a local taxing statute as against the objection that it was obnoxious to the commerce clause of the Federal Constitution, notwithstanding that it was found that practical considerations would prevent the taxpayer from abandoning its intrastate business in order to escape the tax without also withdrawing from its interstate business, and that its interstate and intrastate operations were "inextricably intertwined" (p. 411). This Court there said: "No decision of this Court lends support to the proposition that an occupational tax upon local business, otherwise valid, must be held void merely because the local and interstate branches are for some reason inseparable" (pp. 415-416). This Court further pointed out that "if it [the local tax] burdens interstate commerce at all, it does so by reason of its consequences. This being so, a tax upon the local privilege only must be held valid in the absence of proof that it imposes an undue burden upon interstate commerce. 'The question of constitutional validity is not to be determined by artificial standards.' * * * The alleged indirect tax must be judged by its practical operation" (p. 413). (Brackets, and words enclosed therein, supplied.)

This Court then went on to examine the evidence as to gross operating revenue from each class of business, the relation between the two, and the economic impact of the tax upon each type of operation as well as upon the taxpayer's business as a whole; concluded that no undue burden on interstate commerce was shown; and sustained the validity of the tax under the commerce clause of the Federal Constitution notwithstanding an unavoidable inseparability between the taxpayer's interstate and intrastate operations (pp. 417-420).

In the case at bar there is no evidence whatever as to respondent's gross or net annual operating revenue, whether from interstate, intrastate, or total business, either per vehicle or as a whole. Hence there is no basis in the record for the conclusion reached by the Supreme Court of Illinois that the tax prescribed by the ordinance in practical effect did or would unduly burden respondent's interstate operations.

The crucial error of the Supreme Court of Illinois in the decision here sought to be reviewed is that it held the mere fact of inseparability to be sufficient for invalidation of the ordinance under the commerce clause, without requiring any showing as to whether or not the local tax did in fact constitute an undue burden upon interstate commerce. This, we respectfully submit, is directly contrary to the decision of this Court in *Pacific Telephone and Telegraph Company* v. *Washington Tax Commission*, 297 U. S. 403, 80 L. ed. 760.

The only material distinction between that case and the case at bar is that, there, the local taxing statute was measured by a percentage of gross receipts from intrastate operations, whereas the ordinance here involved prescribes a flat annual charge in respect of each vehicle used in intracity transportation.

The Supreme Court of Illinois, however, did not rest its decision that the ordinance was invalid under the commerce clause upon any distinction between a flat annual charge and a tax based upon gross receipts, but purely and solely upon the factor of inseparability between respondent's interstate and intrastate operations (R. 29, 39-40).

There is nothing in a flat annual charge (as distinguished from a tax graduated according to gross receipts or other variable factor) which is inherently offensive to the commerce clause. This Court has frequently sustained such flat fees imposed by local law as not constituting forbidden burdens upon interstate commerce. (*Morf* v. *Bingaman*, 298 U. S. 407, 412, 80 L. ed. 1245; *Aero Mayflower Transit Co.* v. *Board of R. R. Commrs. of Montana*, 332 U. S. 495, 506, 92 L. ed. 99; *Capitol Greyhound Lines* v. *Brice*, 339 U. S. 542, 94 L. ed. 1053.) These same cases likewise sustain the measure and amount of the tax prescribed by the ordinance in question as fair and reasonable; nor, indeed, can the respondent here contend otherwise in the absence of any showing as to the relation between the amount of the annual tax and the amount of its annual revenue from local operations.

We are not unmindful of the general proposition that a state may not exact a tax for the privilege of engaging in interstate commerce, except as reasonable compensation for necessary and valuable services rendered, such as the use of state highways or other local facilities. The ordinance here involved scrupulously observes this limitation by expressly restricting its coverage to intracity operations. Hence the decisions of this Court invalidating local statutes or ordinances which attempted to impose taxes indiscriminately upon *all* vehicles, whether engaged exclusively in interstate commerce, or engaged exclusively in intrastate commerce, or engaged in both classes of commerce, are not germane to the present inquiry.

In *Pacific Telephone and Telegraph Co.* v. *Washington Tax Commission*, 297 U. S. 403, 80 L. ed. 760, this Court distinguished *Sprout* v. *South Bend*, 277 U. S. 163, 72 L. ed. 833, which involved a flat annual license fee for each vehicle, on the ground that there the ordinance levied the tax indiscriminately on *all* busses, whether engaged exclusively in interstate commerce, or engaged exclusively in intrastate commerce, or engaged in both classes of commerce. This Court pointed out that the license tax was held void because Sprout could not escape payment of the tax by confining himself to interstate business, since the scope of the ordinance reached even those facilities which were employed exclusively in interstate commerce (pp. 416-417).

Similarly, in two other cases involving city ordinances imposing flat annual charges upon motor freight vehicles, this Court held such local levies void under the commerce clause as applied to vehicles engaged exclusively in making hauls, which, although intracity, constituted segments of interstate transportation, so that the tax was actually a direct impost upon interstate commerce. (*Barrett (Adams Express Co.)* v. *City of New York*, 232 U. S. 14, 31, 32, 34-35, 58 L. ed. 483; *Platt (United States Express Co.)* v. *City of New York*, 232 U. S. 35, 58 L. ed. 492). Distinguishable on identical grounds is the case of *People of the State of New York* v. *The Horton Motor Lines*, 281 N. Y. 196, 22 N. E. (2d) 338.

The controlling principle which would appear to run through the decisions of this Court on this subject is that the local statute or ordinance will be upheld as valid where it is strictly confined to local business, but will be held invalid only if it applies indiscriminately to all business whether local or interstate. We are here speaking, of course, of local occupation or privilege taxes, since local taxes imposed as reasonable compensation for the use of

local highways or other facilities have been upheld even where imposed directly upon interstate business. (See the chart of decisions listed in the Appendix to the dissenting opinion of Mr. Justice Frankfurter, in which Mr. Justice Jackson joined in *Capitol Greyhound Lines* v. *Brice*, 339 U. S. 542, 561; 94 L. ed. 1053, 1066).

In the following cases, this Court sustained the validity of local tax legislation because strictly confined to local business. (*Osborne* v. *Florida*, 164 U. S. 650, 654, 655; 41 L. ed. 586; *Pullman Company* v. *Adams*, 189 U. S. 420, 422; 47 L. ed. 877; *Ewing* v. *City of Leavenworth*, 226 U. S. 464, 468-469; 57 L. ed. 303.)

In the following cases, this Court held local tax legislation to be invalid because applying indiscriminately both to local and interstate business. (*Leloup* v. *Port of Mobile*, 127 U. S. 640, 647; 32 L. ed. 311; *Crutcher* v. *Kentucky*, 141 U. S. 47; 35 L. ed. 649; *Williams* v. *Talladega*, 226 U. S. 404, 419; 57 L. ed. 275; *Cooney* v. *Mountain States Telephone & Telegraph Co.*, 294 U. S. 384, 388-389, 390, 393; 79 L. ed. 934.)

In *Leloup* v. *Port of Mobile*, 127 U. S. 640; 32 L. ed. 311, which is frequently cited as a leading case on the subject, the State of Alabama imposed an annual license tax of $225 "on telegraph companies", without restricting it to telegraph companies doing an intrastate business or to the intrastate business of companies doing both local and interstate business. This Court held the tax invalid as a local impost upon the privilege of doing interstate commerce, saying (p. 647):

> "But it is urged that a portion of the telegraph company's business is internal to the State of Alabama, and therefore taxable by the State. But that fact does not remove the difficulty. The tax affects the whole business without discrimination. There are sufficient

modes in which the internal business, if not already taxed in some other way, may be subjected to taxation, without the imposition of a tax which covers the entire operations of the company."

No such constitutional infirmity is present in the ordinance here involved which, in terms as well as by virtue of its construction by the Supreme Court of Illinois, applies only to vehicles employed in purely local transportation, i. e., where the point of origin and the point of destination are both within the corporate limits of the same city. The tax is levied solely in respect of such intracity operations; the amount exacted is not increased because of the interstate business done; and vehicles operated exclusively in interstate transportation are not subject to the tax.

The question still remaining is whether the local tax constitutes an undue burden upon interstate commerce because the respondent cannot feasibly discontinue its purely intrastate operations and still carry on its interstate business. The proof is very meager upon this point; but, assuming that the record establishes that the respondent would have to cease business altogether if it gave up its local business (R. 27), does that circumstance render the respondent immune from a fair and reasonable local tax upon its purely local business shown to be substantial in amount? This is the pivotal issue in the case, and we believe that this Court has answered the question in favor of the validity of such a tax under the commerce clause. According to our appraisal of the decisions of this Court on the subject, a local tax upon purely local business will not be held violative of the commerce clause, provided it does not discriminate against interstate commerce, is fair and reasonable in amount, and is not increased by the fact that interstate commerce is also engaged in; and the fact that the taxpayer needs the local business in order to be

the tax violates the constitution of the United States and imposes a burden on interstate commerce. Both parties further argue as to the validity and invalidity of the ordinance in question.

It is the law in this State that this court will give a construction to a statute which will uphold its validity. The presumption is always in favor of the validity of an ordinance passed in pursuance of statutory authority. *City of Chicago* v. *Hebard Express and Van Co.*, 301 Ill. 570.

It seems clear that the ordinance in question is not invalid by its terms, but could be held to be so by reason of its application to certain operators of carts, under the definition of the ordinance, in and around the city of Chicago. In other words, the ordinance is not invalid *per se*. It is only upon its application that a question of its constitutionality can arise. In *Pacific Express Co.* v. *Seibert*, 142 U. S. 339, it was said, "'Business done within this State' cannot be made to mean business done between that State and other States. We, therefore, concur in the view of the court below that it was not the legislative intention, in the enactment of this statute, to impinge upon interstate commerce, or to interfere with it in any way whatever; and that the statute, when fairly construed, does not in any manner interfere with interstate commerce." Thus, we find that the ordinance in question here, when construed in the light of the above language, is invalid only when it is applied to interstate commerce in its fullest sense.

As contended by the city, there is no question but what a license tax may be imposed upon the defendant for its intracity business. In *Osborne* v. *Florida*, 164 U. S. 650, a Florida statute was involved, imposing an annual license tax on all express companies doing business in the State. The Supreme Court of Florida has construed the statute as not applying to interstate business, but only to local

business, intrastate in character. The Supreme Court of Florida held the statute to be valid and the United States Supreme Court affirmed this holding, pointing out that the construction of the statute by the Supreme Court of Florida, as applying only to intrastate business, was binding upon it and would be accepted by it. The case is authority for the rule that a statute so construed does not exempt the express company from taxation upon its business which is solely within the State, even though at the same time the same company may do a business which is interstate in character.

However, the mere operation of trucks by the defendant "within the city" is not sufficient to determine the issues here. The legal effect of such operation must be considered.

As we have previously stated, the question here is one of application of the ordinance to the practical aspects of the hauling done by the defendant. In addition to arguing that the statute itself provides only for taxation upon persons transporting property "within the city" and that this deals only with intrastate business, the city of Chicago admits that where the intracity and interstate operations are inseparable, and the defendant cannot separate the two, nor continue to engage in business if separation is attempted, the argument as to the tax being a burden upon interstate commerce might apply.

It is only when a separation, in fact, of intrastate and interstate business exists that a like separation may be recognized between the control of the State and that of the nation. (See *Osborne* v. *Florida,* 164 U. S. 650, and *Pullman Co.* v. *Adams,* 189 U. S. 420.) The city argues, however, that no inseparability has been shown and that the defendant has not met the burden of proof in this regard. The burden is on him who asserts that, although actually within, the traffic is legally outside the State; un-

able to carry on its interstate business, far from being an argument against the validity of the local tax, would seem to furnish an added ground for not permitting the taxpayer to escape the local tax upon his purely local business.

Some of the recent decisions of this Court involving the question of the validity under the commerce clause of local taxing legislation, while not directly in point, are quite illuminative of this Court's approach to the problem.

In *Interstate Oil Pipe Line Co.* v. *Stone*, 337 U. S. 662, 93 L ed. 1613, this Court sustained a state privilege tax upon the transmission of oil by pipeline from producing points within the State to loading racks adjacent to railroads within the State, although accompanied by shipping orders from the producer or owner directing that the oil be transported to out-of-state destinations. Four members of this Court held the tax not violative of the commerce clause irrespective of whether or not the business taxed was interstate commerce, because the tax was not discriminatory, could not be repeated by any other state, did not require apportionment since the business taxed was all of the same nature, i.e., the transmission of oil within the State though destined to points outside the State; and did not purport to cover interstate activities carried on beyond the State's borders (337 U. S. at p. 668). One member of the Court concurred on the ground that the activity taxed was intrastate, i.e., operating a pipeline in intrastate commerce (337 U. S. at pp. 668-669). Four members dissented on the ground that the transmission of the oil to gathering points within the State for out-of-state shipment was wholly and entirely interstate commerce, the doing of which could not, under the commerce clause, be made subject to a local privilege tax (337 U. S. at p. 669). It is significant to note, however, that the dissenting opinion nevertheless declares (337 U. S. at p. 679):

"Where the corporate taxpayer conducts intrastate as well as interstate business, a franchise privilege or excise tax on the former is of course permissible."

The doctrine of the foregoing decision goes beyond what is necessary to sustain the validity under the commerce clause of the tax imposed by the ordinance in the instant case. Here, the tax is strictly confined to respondent's local business which constitutes a substantial portion of respondent's total operations, and there is no attempt to tax any interstate operations at all.

In the recent case of *Spector Motor Service, Inc.* v. *O'Connor*, 340 U. S. 602, 95 L. ed. 573, a state tax on corporations, measured by the net income from business transacted within the State, was held invalid under the commerce clause as applied to a foreign corporation engaged exclusively in the interstate trucking of freight. The majority opinion pointed out that this was a local tax laid directly upon interstate commerce because the company was not engaged in intrastate commerce to any extent whatever. The Court said (pp. 606, 607-608):

"The incidence of the tax is upon no intrastate commerce activities because there are none. Petitioner is engaged only in interstate transportation."

* * * * * * *

"It is a 'tax or excise' placed unequivocally upon the corporation's franchise for the privilege of carrying on exclusively interstate transportation in the State."

The Court then made the following significant declaration (pp. 609-610):

"This Court heretofore has struck down, under the Commerce Clause, state taxes upon the privilege of carrying on a business that was *exclusively* interstate in character. [The emphasis is the Court's own.]

* * * * * * *

"Our conclusion is not in conflict with the principle that, where a taxpayer is engaged both in intrastate

and interstate commerce, a state may tax the privilege of carrying on intrastate business and, within reasonable limits, may compute the amount of the charge by applying the tax rate to a fair proportion of the taxpayer's business done within the state, including both interstate and intrastate." (Citing cases.)

In the dissenting opinion, (in which three Justices joined), it was urged that the tax was valid because "nondiscriminatory, fairly apportioned and not an undue burden on interstate commerce" (p. 610). "Hence," said the dissent, "if appellant had been engaged in an iota of activity which the Court would be willing to call 'intrastate', Connecticut could have applied its tax to the company's interstate business in the precise form which it now seeks to employ—a tax on the privilege of doing business in Connecticut measured by the entire net income attributable to the State, even though derived from interstate commerce" (pp. 610-611).

In the case at bar, the intrastate activity of the respondent consists of more than a mere "iota"; it is considerable and substantial, since each of respondent's vehicles carries some purely local freight "during every single day of the year" (R. 9).

Nor does the fact that the proportion of intracity and interstate business may not be the same for each vehicle, or that it varies during different periods of the year in the use of the same vehicle, have any material bearing upon the question. As this Court has said in *Aero Mayflower Transit Co.* v. *Georgia Public Service Commission*, 295 U. S. 285, 79 L. ed. 1439:

> "The fee is for the privilege for a use as extensive as the carrier wills that it shall be. There is nothing unreasonable or oppressive in a burden so imposed. • • • One who receives a privilege without limit is not wronged by his own refusal to enjoy it as freely as he may." (295 U. S. 285, at p. 289).

That the tax here is a flat annual charge per vehicle, rather than a tax measured by a percentage of gross receipts from local operations, does not render it any more burdensome to the respondent. Indeed, a tax based upon such latter formula would introduce insuperable complexities in its administration, as well as obstacles to the taxpayer's attempt to comply therewith, which are obviated by the present flat annual charge upon each vehicle. According to the record here, respondent's executive vice president testified that respondent "does not keep any record to determine the proportion of interstate as compared to intrastate and local operations" (R. 12), and that "there is no way in which we can determine the proportion of local transporation as compared to interstate and intrastate" (R. 13). The Stipulation of Facts recites that there are more than 3,000 motor freight carriers in the City of Chicago "similarly situated" (R. 10). The City of Chicago was thus confronted with a difficult choice as to method, and it finally concluded that a flat annual tax, reasonable in amount, upon each vehicle used in intracity transportation, and in accordance with its load-carrying capacity, was a fair and legally permissible formula.

This Court has recognized the difficulties confronting States and municipalities in gearing local transportation taxes to relevant factors, and has declared that the validity of a local tax should be judged by its result, not its formula; that the tax will be sustained if not shown to be unreasonable in amount (*Capitol Greyhound Lines* v. *Brice*, 339 U. S. 542, 545; 94 L. ed. 1053); and that the burden of proof in this respect is upon a carrier who challenges the validity of the tax (339 U. S. 542, at p. 548).

Respondent has not shown that the moderate schedule of flat annual charges per vehicle based upon its load-carrying capacity is in excess of a reasonable fee for the privilege of its use in intracity commerce. Hence, no portion of the tax

constitutes a charge for the privilege of using the vehicle in interstate commerce. The ordinance, as construed, disclaims any such purpose, and the record wholly fails to show that its application to respondent will produce any such unconstitutional result.

II.

This Court has repeatedly declared that it will not suffer local revenue laws to be invalidated as obnoxious to the commerce clause of the Federal Constitution upon a record wholly lacking in proof upon the vital issue of undue burden, but will either remand the cause to the state court for the taking of evidence thereon, or will sustain the legislation under the doctrine of presumptive validity.

In the case at bar, there can be no difference of opinion as to the inadequacy of the record to support the judgment of the Illinois Supreme Court, since there is a complete lack of evidence on the issue of undue burden. Manifestly, therefore, the ordinance either should have been sustained on the doctrine of presumptive validity or, in the alternative, the cause should have been remanded for the taking of evidence on the controlling issue whether the enforcement of the ordinance against the respondent does or will in fact impose an undue burden upon its interstate business. Instead, the Supreme Court of Illinois held the ordinance void and unenforceable as applied to the respondent without any evidence on the crucial issue of undue burden.

Where the evidence is "too inexplicit to supply the answers", and "the needed information is neither accessible to judicial notice nor within its proper scope", the case should be sent back to the lower court for further hearing in order "to avoid constitutional adjudication without adequate knowledge of the relevant facts". (See the dissent-

ing opinion of Mr. Justice Frankfurter in *Hood* v. *DuMond*, 336 U. S. 525, at p. 574, 93 L. ed. 865, at p. 893, and cases therein cited.)

We do not concede, however, that the record is not sufficient to sustain the validity of the ordinance under the commerce clause as applied to the respondent, since it is abundantly clear from the evidence that respondent was engaged in purely local business to a substantial extent, and the ordinance imposes the tax only in respect of such purely local operations.

III.

The question of the validity of the city ordinance here involved under the commerce clause of the Federal Constitution is of far-reaching importance to all state and municipal taxing bodies.

The Supreme Court of Illinois felt constrained to invalidate the ordinance in deference to the Federal power to prevent or remove obstructions to interstate commerce, notwithstanding that the ordinance represents a species of important revenue legislation enacted pursuant to an express statutory grant to municipalities (R. 4).

The record shows that the respondent operates about 1,200 motor vehicles in its business (R. 12). Each of these is operated daily in some intracity transportation (R. 9). There are more than 2,000 individuals, firms, or corporations who are engaged in the City of Chicago in the transportation of freight by motor vehicle in intracity commerce (R. 10). The aggregate number of vehicles that would be subject to the tax under the ordinance is not shown, but it is clear even from this meager record that the amount of annual revenue collectible thereunder is not inconsiderable.

Apart from the quantum of the revenue involved, the question (squarely presented in this case) whether a local taxing statute (or ordinance) may properly be invalidated as obnoxious to the commerce clause of the Federal Constitution, on a record completely devoid of proof that the ordinance imposes an undue burden upon interstate commerce, would clearly seem to be of sufficient importance to all state and municipal taxing bodies to warrant a clear and unequivocal declaration thereon by this Court. For if inseparability alone be decisive of invalidity, then much local business can escape local taxation simply by integrating itself with interstate operations. This Court has already declared that such intermixture does not suffice as an avenue of escape from local taxation, especially where the purely local business constitutes a substantial portion of the taxpayer's total operations.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be allowed, and that the judgment of the Supreme Court of Illinois should be reversed.

Respectfully submitted,

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APPENDIX "A".

(Text of Opinion of Supreme Court of Illinois.)

Docket No. 31312—Agenda 16—March, 1950.

The City of Chicago, Appellant, v. The Willett Company, Appellee.

Mr. Justice Fulton delivered the opinion of the court:

This cause is heard here on direct appeal from a judgment of the municipal court of Chicago, finding the Willett Company, hereinafter referred to as defendant, not guilty in an action brought by the city of Chicago, which charged said defendant with engaging in the business of a carter within the city of Chicago without first having obtained or paid for a license therefor, in violation of chapter 163, Municipal Code of Chicago.

The cause was heard by the court without a jury. The parties filed a stipulation which, with certain testimony of the executive vice-president of the defendant company, constitutes the record in the cause. The trial court has certified that the validity of a municipal ordinance is involved.

Chapter 163 of the Chicago Municipal Code relates to carters and provides, in brief, that any dray type of vehicle driven or employed for the purpose of transporting or conveying property and merchandise within the city for hire or reward shall be deemed a cart within the meaning of the chapter, whether the vehicle be employed or hired from any public stand, public way, barn, garage, office or other place, or whether it be hired for the day, week, month or year. A license tax is imposed by the ordinance for each cart operated or controlled by every carter according to established fees and schedules.

The foregoing section as passed repeals the prior public carters' ordinance as well as the furniture movers ordinance.

The defendant is an Illinois corporation, with its offices in Chicago, and was engaged in the business of transporting property by motor vehicles for hire in the city of Chicago. It operates as a contract carrier of commodities by motor vehicle from points and places within the State of Illinois, to points and places in the States of Indiana and Wisconsin. It further carries property within the city of Chicago from point to point under contract with various firms and other interstate and intrastate carriers entering the city. It holds itself out to serve the public and connecting carriers and forwarding companies generally up to the limit of its capacity, either (a) by leasing trucks with drivers to shippers by the hour, day, week or year or other period, (b) by making contracts with shippers to perform all trucking for a fixed period, (c) by giving occasional service or handling single shipments in local cartage for any shipper at a rate per hundred pounds, per ton, per piece, or other unit, (d) by distributing pooling cars, and (e) by rendering collection and delivery service, station or substation service, for rail, water and highway motor carriers and forwarding companies, either under contract or on some other basis. It was further stipulated that the motor vehicles operated by the defendant company in the course of a day's business would transport property from points within the city of Chicago to other points within the city of Chicago, from points within the city of Chicago to other points within the State of Illinois outside the city and from points in Chicago to other States surrounding Illinois and return. The defendant did not comply with the provisions of the carters ordinance, arguing that the ordinance was void and of no legal effect because it is in

conflict with the constitution of the United States; it is in conflict with the constitution of Illinois; it is in conflict with section 25-31 of the Revised Cities and Villages Act; and it is in conflict with the Illinois Truck Act of 1939, as amended.

The finding of the trial court for the defendant is apparently based on the ground that the application of the ordinance to the defendant carrier's business would create a burden upon interstate commerce and that, therefore, the defendant is exempt from the provisions of the carters ordinance of the city of Chicago.

The argument of the city of Chicago, the appellant here, is to the effect that by the terms of the ordinance, the license fee is restricted to carters doing business "within the city" and that the natural meaning of those words restricts the ordinance to intracity business and it cannot apply to interstate commerce. In support of this construction, appellant cites *Pacific Express Company* v. *Seibert*, 142 U. S. 339, and related cases. It further argues that the mere fact that the defendant company is engaged in interstate commerce, as well as intrastate and intracity, does not prevent the city of Chicago from imposing an occupation tax upon the defendant with respect to the purely intracity operations in which the defendant is admittedly engaged. To support this view, they cite cases such as *Osborne* v. *Florida*, 164 U. S. 650, *Pullman Co.* v. *Adams*, 189 U. S. 420, and like cases.

The defendant, on the other hand, cites *People* v. *Horton Motor Lines*, 281 N. Y. 196; *Northern Pacific Railway Co.* v. *Washington*, 222 U. S. 370, and *Sprout* v. *South Bend*, 277 U. S. 166, and similar cases for the proposition that the State or municipality cannot tax interstate commerce and, in situations such as the one before the court,

less the interstate character is established, locality determines the question of jurisdiction. *Pennsylvania Railroad Co.* v. *Knight,* 192 U. S. 21.

The only evidence in this record is that of Howard L. Willett, Jr., who is the executive vice-president of the defendant company, and who stated on the stand that his company engaged in interstate, intrastate and local freight in the city of Chicago. It is not clear from the testimony or the questions asked of Willett whether or not he was familiar with the legal meaning of the term "intercity freight." It is apparent that the Willett Company operates from Chicago to surrounding States and in that manner engages in interstate commerce. They also engage as a contract carrier with other carriers coming into the city of Chicago from outside the State of Illinois. Whether or not by intercity operation Willett meant only that his trucks operated within the city of Chicago is another thing. The record is silent on that point.

He did testify that it was not possible to separate the intrastate freight from the interstate freight and the intercity freight hauled by the defendant. He further stated that defendant could not keep records of the shipments it made each day within the city of Chicago as to interstate, intracity or intrastate character.

It appears, insofar as we can ascertain from this record, that the defendant herein operates its trucks under contract with large industries, and, in the main, with other interstate carriers bringing property into the city of Chicago. The defendant itself does not determine what articles it shall carry on its trucks, but carries articles of all kinds, in interstate, intrastate and intracity traffic. It has no basis for differentiating between the shipments which it carries on its trucks, but carries what is given it by the contractor, retailer or carrier with whom it is dealing, and on every

load the three types of property are so intermingled as to be impossible of separation. It is apparent from these statements that the type of business done by the defendant herein is not one generally considered to be within the meaning of a carter's ordinance. The defendant does not keep records of the shipments because he does not handle the shipments as such. He does not go from house to house picking up shipments for delivery within the city of Chicago, but his entire business is concerned with hauling under contract for various firms, enterprises and other contracts carriers in the city of Chicago.

The cross-examination by the city of Chicago did not counteract the statements of this witness, and his statements as to nonseparability remained unchallenged in the record. All of the trucks, over 1200 of them, are engaged in the type of work which has been described. It was evident that the type of contracts the defendant has with other companies deal mainly with other carriers. The defendant has contracts with the Pennsylvania Railroad, Acme Fast Freight, Air Cargo, Ryerson Steel, U. S. Steel, Youngstown Steel, H. J. Heinz Company, Standard Brands Company, Glidden Company and others of that nature. All of these companies have either offices or plants in the city of Chicago.

On cross-examination the witness testified that insofar as the operations of the defendant were concerned, there was no possible way in which they could determine the proportion of local transportation as compared to intrastate and interstate, but he did state that in all the operations, every truck had some of all types of freight on it.

In view of the uncontradicted testimony in the record, it would appear that the defendant is not able to separate its intracity business from its interstate business, nor can it keep records of such business, nor can it continue in any

one of the operations without giving up its entire business. In other words, it needs all of its business to keep in operation.

In *Pullman Co.* v. *Adams,* 189 U. S. 420, a Mississippi statute was involved, imposing a privilege tax on each sleeping-car company carrying passengers from one point to another within the State. The proof showed that the defendant company carried passengers into Mississippi from points outside the State, or out of Mississippi from points within the State, but that the same cars also carried passengers from point to point within the State. It was contended that the tax was invalid as a burden upon interstate commerce. The United States Supreme Court affirmed the judgment of the State court, holding the tax valid, saying that the defendant had the right to choose between what points it would carry persons and, therefore, the right to give up the carriage of passengers from one point to another within the State. The court further said, "The company cannot complain of being taxed for the privilege of doing a local business which it is free to renounce." The distinguishing factor in that case and in the situation before us is that the record is clear and uncontroverted that the defendant herein is not free to renounce. The record is uncontradicted that the defendant cannot engage in any one portion of its business without the other.

In *Sprout* v. *South Bend,* 277 U. S. 166, the Supreme Court of the United States, considering an ordinance of the city of South Bend imposing a license on motor busses, stated, "But in order that the fee or tax shall be valid, it must appear that it is imposed solely on account of the intrastate business; that the amount exacted is not increased because of the interstate business done; that one engaged exclusively in interstate commerce would not be subject to the imposition; and that the person taxed could

discontinue the intrastate business without withdrawing also from the interstate business." The evidence in the instant cause makes this language applicable to the case here.

The case is similar in some respects to *People* v. *Horton Motor Lines, Inc.*, 281 N. Y. 196, 22 N. E. 2d 338. That case involved an interstate motor carrier which operated a fleet of trucks within the city of New York to deliver and pick up freight to and from its New York terminal or to other shippers within the city. The question involved was whether the public carter's ordinance could be applied to the defendants' small trucks which engaged primarily in interstate commerce, although all operated "within the city." In determining that the defendant was not subject to the carter's ordinance, the court cited *Northern Pacific Railway Co.* v. *Washington ex rel. Atkinson*, 222 U. S. 370. In that case it was said, "The train, although moving from one point to another in the State of Washington, was hauling merchandise from points outside of the State destined to points within the State and from points within the State to points in British Columbia, as well as in carrying merchandise which had originated outside the State and was in transit through the State to a foreign destination. This transportation was interstate commerce, and the train was an interstate train."

The language of this last cited case is applicable here. While the defendant may have intracity loads in part upon its trucks, it is clear that every load combines intrastate and interstate property as well. The incidental carrying of loads within the city does not make the defendant subject to the license tax here. The defendant cannot separate its loads, nor can it discontinue any part of the service. Under these facts, we must conclude that the defendant is engaged

in interstate commerce within the meaning of that term and is not subject to the license tax here in question.

Under the view we have taken in this cause, it is not necessary to consider the other arguments made by the appellant and appellee. For the reasons stated herein, the judgment of the municipal court of the city of Chicago is affirmed.

Judgment affirmed.

THOMPSON, C. J. and CRAMPTON, J., dissenting.

APPENDIX "B".

(Text of Order of Supreme Court of the United States, granting certiorari, etc.)

No. 493. October Term, 1950.

City of Chicago, Petitioner, v. The Willett Co., Respondent.

"April 23, 1951. Per Curiam: The petition for writ of certiorari is granted. The judgment is vacated and the case is remanded to the Supreme Court of Illinois for clarification by that court to show, in light of *Minnesota v. National Tea Co.*, 309 U. S. 551, 84 L. ed. 920, 60 S. Ct. 676; *State Tax Com.* v. *Van Cott*, 306 U. S. 511, 83 L. ed. 950, 59 S. Ct. 605, whether the judgment herein rests on an adequate and independent state ground or whether decision of a federal question was necessary to the judgment rendered."

[Reported in 341 U. S. 913, 95 L. ed. 1349.]

APPENDIX "C".

(Text of Clarifying Opinion and Decision of Supreme Court of Illinois, pursuant to Mandate of Supreme Court of the United States upon entry of order granting certiorari, etc.)

[Rendered and Filed December 17, 1951.]

Docket No. 31312.

The City of Chicago, Appellant, v. The Willett Company, Appellee.

Mr. JUSTICE FULTON delivered the opinion of the court:

Pursuant to the order entered by the United States Supreme Court in the cause of *City of Chicago* v. *The Willett Co.* (No. 493, October term, 1950, of said court,) requesting a clarification of our opinion in the same cause, reported in 406 Ill. 286, as to whether or not a decision of a Federal question was necessary, the basis for the opinion in said cause is as follows:

Osborne v. *Florida,* 164 U. S. 650, and *Pullman Co.* v. *Adams,* 189 U. S. 420, hold that only when a separation, in fact, of intrastate and interstate business exists a like separation may be recognized between the control of the State and that of the nation to apply a tax such as proposed here. The burden of proving inseparability is on him who asserts that, although actually within, the traffic is legally outside the State; that unless the interstate character is established, locality determines the question of jurisdiction. (*Pennsylvania Railroad Co.* v. *Knight,* 192 U. S. 21.) *Sprout* v. *South Bend,* 277 U. S. 166, holds that in order that the fee or tax be valid it must appear that it is imposed solely on account of the intrastate business;

that the amount exacted does not increase because of the interstate business done; and that the person taxed could discontinue the intrastate business without withdrawing also from the interstate business.

The sole evidence in the cause, to which fact situation the above rules of law had to be applied, was to the effect that the Willett Company is not able to separate intrastate from interstate and inter-city business, nor can it keep records of such business or degrees of business, nor can it continue in any one of its operations without giving up its entire business. The city did not contradict, oppose or challenge this evidence either by introducing evidence in opposition thereto or by cross-examining the witnesses to challenge their veracity.

Our decision is that the Chicago carters ordinance is valid, but, in the light of the rules of the foregoing cases, could not be applied to the Willett Company because of the uncontradicted evidence which removes the Willett Company from an application of the license tax.

The judgment of the municipal court of the city of Chicago is affirmed.

Judgment affirmed.

APPENDIX "D".

(Text of Ordinance involved.)

Be it ordained by the City Council of the City of Chicago:

Section 1. This Ordinance shall be known as Chapter 63 of the Municipal Code of Chicago, and shall be designated as the Carters Ordinance:

Chapter 163

Carters

163-1. Every express wagon, cart, truck, dray, wagon, utomobile, autocar, auto truck, or other vehicle of ny kind, either drawn by animal or self-propelled, hich shall be operated, driven or employed for the purose of transporting or conveying bundles, parcels, furniure, trunks, baggage, goods, wares, merchandise, produce, r other articles within the city for hire or reward, shall be eemed a cart within the meaning of this chapter, whether uch vehicle is employed or hired from any public stand, ublic way, barn, garage, office, or other place in the city y the day, week, month or year.

Any person engaged in the business of operating a cart hall be deemed a carter.

163-2. An annual license tax is imposed upon every arter for each cart operated or controlled by him, accordng to the following schedule:

Horsedrawn vehicle—

One-horse	$ 2.75
Two-horse	5.50
Three-horse	6.25
Four-horse	11.00
Six-horse	13.75

Automotive vehicles—

Capacity not exceeding two tons	$ 8.25
Capacity exceeding two but not exceeding three tons	11.00
Capacity exceeding three but not exceeding four tons	13.00
Capacity exceeding four tons	16.50

No license shall issue except upon payment of the full annual license tax.

It shall be unlawful for any person to engage in the business of a carter without first having paid such license tax.

163.3. An application shall be made in conformity with the general requirements of this code relating to applications for licenses and such application shall include a statement of the number of vehicles with such details of description and on such forms as may be required by the City Collector.

The City Clerk shall deliver to each carter, upon payment of the license tax herein imposed, a license emblem which shall bear the words "carter" and the numerals designating the year for which such license tax has been paid. It shall be the duty of the carter to affix the license emblem in a conspicuous place on the vehicle. It shall be unlawful for any person to drive a cart which does not bear such license emblem.

163-4. Any person violating any of the provisions of this chapter shall be fined not less than fifty dollars nor more than two hundred dollars for each offense and each day such violation shall continue shall be regarded as a separate offense.

Section 2. Chapter 163, entitled "Public Carters" as it as heretofore appeared in the Municipal Code of Chicago s hereby repealed.

Section 3. Chapter 132, entitled "Furniture Movers" of he Municipal Code of Chicago, is hereby repealed.

Section 4. This Ordinance shall be in force and effect pon passage and due publication.

(*Journal of the Proceedings of the City Council of the ity of Chicago, Illinois, for January 14, 1949, page 3679.*)

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1952

No. 23

CITY OF CHICAGO, a Municipal Corporation,
Petitioner,

vs.

THE WILLETT COMPANY, an Illinois Corporation,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

REPLY BRIEF FOR PETITIONER.

JOHN J. MORTIMER,
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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1951.

No. 644

CITY OF CHICAGO, a Municipal Corporation,
Petitioner,

vs.

THE WILLETT COMPANY, an Illinois Corporation,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

REPLY BRIEF FOR PETITIONER.

I.

The state court did not construe the ordinance as exempting vehicles used both in local and interstate commerce where the two types of commerce are not inseparable; so that its decision that the ordinance was inapplicable to respondent's business rests entirely upon the court's conclusion that the commerce clause bars a local tax upon purely local business when it is inseparably intertwined with the same taxpayer's interstate operations. This is clearly a Federal question.

Respondent's claim that the state court did not decide a Federal question is founded upon the erroneous premise that the ordinance was construed as limited to vehicles engaged exclusively in intracity transportation, *i. e.*, that vehicles used both in local and interstate commerce (although separable) are not within the intended reach of the ordinance at all. It is clear both from the principal opinion (R. 22-19) and from the clarifying opinion (R. 39-40) that the ordinance was construed as not exempting from the local tax vehicles used in both kinds of commerce, if separable. The opinion of the Supreme Court of Illinois expressly states (R. 25):

> "As contended by the city, there is no question but what a license tax may be imposed upon the defendant for its intracity business."

The opinion then referred to this Court's decision in *Osborne* v. *Florida*, 164 U. S. 650, where the state court had construed a state statute imposing a license tax on business done "within the city" (just as in the ordinance at bar) as confined to local, and as excluding interstate, business (R. 25). The opinion then appraises the decision in *Osborne* v. *Florida*, 164 U. S. 650, as follows (R. 25):

> "The case is authority for the rule that a statute so construed does not exempt the express company from taxation upon its business which is solely within the State, even though at the same time the same company may do a business which is interstate in character."

It was the inseparability between the two types of commerce which impelled the court to hold that even the local commerce assumed an interstate character and hence was

not subject to the local tax. Thus the opinion states (R. 25):

> "The defendant cannot separate its loads, nor can it discontinue any part of the service. Under these facts, we must conclude that the defendant is engaged in interstate commerce within the meaning of that term and is not subject to the license tax here in question."

The subsequent clarification of the opinion, pursuant to the mandate of this Court, confirms beyond all doubt (1) that the Supreme Court of Illinois did not construe the ordinance as exempting vehicles from the tax merely because they were engaged both in local and interstate commerce, whether separable or not, and (2) that the decision that the ordinance was inapplicable to respondent's business rests entirely upon the court's conclusion that the commerce clause precludes the imposition of the local tax even upon respondent's purely local business because of the inseparability between respondent's local and interstate operations (R. 39-40). This, we respectfully submit, is clearly a Federal question which this Court has the ultimate power to decide.

The interpretation which respondent is seeking to place upon the state court's decision would, if adopted, impute to the Illinois Supreme Court an intent to interpose, arbitrarily, an unfounded and unsupportable non-Federal ground of decision as a mere device to prevent the review by this Court of the Federal question upon which the state court's judgment necessarily rests. Such an imputation is unwarranted, nor will this Court permit such an evasion of its review jurisdiction in any event. (*McCoy* v. *Shaw*, 277 U. S. 302, 303; 72 L. ed. 891, 892; *Ancient Egyptian Arabic Order, etc.* v. *Michaux*, 279 U. S.

737, 745; 73 L. ed. 931, 936.) And this Court has held that it will determine for itself whether the state court judgment is based on a matter of purely local concern or necessarily rests upon the decision of a Federal question. (*Vandalia Railroad Co.* v. *State of Indiana ex rel. City of South Bend*, 207 U. S. 359, 367; 52 L. ed. 246, 248; *Angel* v. *Bullington*, 330 U. S. 183, 189; 91 L. ed. 832, 836.)

II.

The decision of the Illinois Supreme Court is in conflict with the decisions of this Court on the Federal question forming the basis of the state court judgment.

Respondent contends that its business is largely interstate commerce, and suggests (Br., p. 11) that a shipment of freight within the city is within the scope of the ordinance although it be but a segment of an interstate journey. This is an erroneous representation of the construction placed upon the ordinance by the Illinois Supreme Court which held that it taxed only intracity commerce, *i. e.*, shipments which commenced and ended within the city limits (R. 24-25). The ordinance in express terms taxes vehicles engaged in transportation "within the city" (R. 5), and the Illinois Supreme Court construed said quoted phrase to mean shipments whose point of origin and point of destination were both within the city limits. In so construing the phrase "within the city", the state court adopted and followed the language of this Court in *Pacific Express Co.* v. *Seibert*, 142 U. S. 339, where it was stated: "'Business done within this State' cannot be made to mean business done between that State and other States" (R. 24-25). Indeed, had the state court construed shipments "within the city" to include initial, intermediate or terminal within-

the-city segments of interstate commerce, it would not have upheld the validity of the ordinance. What the Illinois Supreme Court really did was to construe the ordinance as confined to purely local commerce and therefore valid, but to hold that the commerce clause barred its application to respondent's business because it consisted also of interstate commerce which was inseparably intertwined with respondent's purely local business.

What respondent is really attempting to do is to make it appear that its intracity business, which is the only thing the ordinance seeks to tax, is not purely local business but really a part or segment of interstate commerce. This is contrary to the record which expressly stipulates that each of respondent's vehicles, during every single day of the year, carries not only property destined to points outside the city and outside the State, but also "property which never leaves the city" (R. 9).

Respondent relies upon *Northern Pacific Ry. Co.* v. *Washington*, 222 U. S. 370, 56 L. ed. 237 (Resp. Br., p. 10), which held that a crew operating a train carrying interstate and intrastate freight at the same time was subject to Federal regulation as to hours of service, notwithstanding that part of its load consisted of intrastate commerce. There is nothing in that decision involving the power of a State or municipality to tax the local business of a person who is also engaged in interstate commerce at the same time. The inapplicability of that decision to the case at bar stems also from the fundamental distinction between *regulation* and *taxation* in determining the propriety of the simultaneous co-exercise of Federal and State power. The paramount Federal power to *regulate* an instrumentality engaged both in interstate and local commerce at the same time may well preclude the enforcement of a

conflicting local regulatory provision limited to the local business, where the attempted enforcement of both regulations would bring them into collision. *Taxation*, however, possesses a greater conformability and flexibility, permitting the co-exercise of Federal and State power, each in its proper sphere, without the encroachment of the one upon the other, notwithstanding the inseparable commingling of Federal and State subject-matter. The ordinance here is purely a revenue measure aimed only at the local operations of the respondent. It does not seek to tax any vehicle in respect of its use in interstate commerce. If the local tax upon the local business is reasonable in amount, and is not a disguised attempt to impose a charge for the doing of interstate business, then the local taxing power operates within its proper sphere no matter how closely intertwined the interstate and local operations of the taxpayer may be. We believe that this is a fairly accurate paraphrase of what this Court has said upon this subject.

The case of *Sprout* v. *South Bend*, 277 U. S. 163, 72 L. ed. 883 (Resp. Br., pp. 13-14), has already been distinguished in our certiorari petition (p. 19). This Court pointed out in that case that the Supreme Court of Indiana construed the ordinance there involved as applying not only to busses engaged in intrastate commerce, and to busses engaged both in intrastate and interstate commerce, *but also to busses operated exclusively in interstate commerce;* and it is for that reason that this Court held the local occupation tax void under the commerce clause (277 U. S. 163, at p. 171).

The case of *Cooney* v. *Mountain States Telephone & Telegraph Co.*, 294 U. S. 384, 79 L. ed. 934 (Resp. Br., pp. 14-16), has likewise been distinguished in our certiorari

petition (p. 20) on the ground that, there, the local taxing statute was held invalid because applying indiscriminately both to local as well as to exclusively interstate business. The tax in that case was imposed upon each telephone instrument used in furnishing telephone service in the State of Montana, and this Court pointed out that it did not appear that the statute had been construed by the state court (294 U. S. 384, at p. 398). This Court there also pointed out the distinction between the two cases of *State* v. *Rocky Mountain Bell Telephone Co.*, 27 Mont. 394, 71 Pac. 311, where the state court construed the statute to apply only to telephone instruments used in purely intrastate business and held it to be valid, and *State* v. *Northern Pacific Express Co.*, 27 Mont. 419, 71 Pac. 404, where the state court held the occupation tax void because it applied indiscriminately to interstate as well as to local transportation (294 U. S. 384, at pp. 388-389). This Court held the tax in the *Cooney* case invalid for the following explicit reasons (294 U. S. 384, at pp. 390-391):

> "No distinction is made between interstate and intrastate service.
>
> * * * * *
>
> "Again, there is no limitation as to use, control or operation in intrastate business.
>
> * * * * *
>
> "The tax is thus laid simply by reason of the fact that the company is furnishing telephone service and is based upon the number of telephone instruments used in that service without regard to its character whether intrastate or interstate.
>
> * * * * *
>
> "All the telephone instruments, not excepted, whether they are used in intrastate or interstate commerce and however the service is paid for, are left subject to the tax."

The ordinance in the case at bar is not subject to this objection because, by its terms and as construed by the Supreme Court of Illinois, it taxes the vehicles only in so far as they are used in intracity business and does not attempt to tax vehicles used exclusively in interstate commerce.

Respondent's Brief (p. 16) attempts to distinguish the case of *Pacific Telephone and Telegraph Co.* v. *Washington Tax Commission*, 297 U. S. 403, 80 L. ed. 760, on the ground that there the tax was levied solely upon the gross income from intrastate commerce. This may be a distinction of form, but not of substance. Here, also, the tax is levied upon vehicles solely in respect of their use in local commerce; no part of the tax is referable to any interstate business in which the same vehicle may be used; and any vehicles used exclusively in interstate commerce would not be subject to the tax at all.

III

The ordinance does not cast an undue burden upon interstate commerce, since it imposes the tax only upon vehicles engaged in local commerce, and the fact that such vehicles are also used in interstate commerce, and that both types of commerce are inseparably linked, does not ipso facto establish a case of undue burden.

Respondent contends (Br., pp. 18-19) that the tax levied by the ordinance is a direct burden upon interstate commerce because it taxes vehicles that are used both in intrastate and interstate transportation which are inseparably intertwined. This ignores the proposition that the ordinance does not purport to tax motor vehicles because they are used in interstate commerce, but only because they are

engaged in local commerce. The fact that the same vehicle which is engaged in local commerce, and taxed for that reason, is also engaged in interstate commerce, does not convert the tax levied by reason of the vehicle's use in local commerce into a tax upon interstate commerce to any extent at all. This is altogether different from the situation involved in *Cooney* v. *Mountain States Telephone and Telegraph Co.*, 294 U. S. 384, 79 L. ed. 934 (Resp. Br., p. 18), where the tax was levied indiscriminately upon all telephone instruments within the State, irrespective of whether they were used only in local commerce, or both in local and interstate commerce, or exclusively in interstate commerce.

It is respectfully submitted that a local tax upon a vehicle admittedly used in local commerce does not become a tax upon an instrumentality of interstate commerce, notwithstanding that the same vehicle is also engaged in interstate commerce, and that both types of use are inseparable. Consequently, the respondent's contention that the tax here involved is "necessarily" a tax upon an instrumentality of interstate commerce and needs no evidence to establish the existence of an undue burden upon interstate commerce, or that undue burden is presumed from the fact of inseparability between both types of commerce, is entirely without merit.

IV.

The Federal question here presented is of great public importance both from a qualitative and quantitative standpoint.

Respondent's contention that this case presents no important question of Federal law is premised upon its erroneous contention (already adequately refuted) that no Federal question is involved at all. Contrary to the assertion in Respondent's Brief (p. 19), the Illinois Supreme Court did more than merely construe the ordinance as valid because intending to apply only to vehicles in respect of their local operations. It went further and held the ordinance inoperative as against the respondent by reason of the erroneous conclusion reached that the commerce clause of the Federal Constitution prevents the imposition of a local tax upon vehicles engaged in local commerce, merely because such vehicles also engage in interstate commerce, and an inseparability exists between the two types of commerce. This was a decision of a Federal question.

Respondent asserts finally (Br., p. 19) that the question presented involves only the operations of this particular respondent. This contention ignores the record which shows that there are "upward of 3,000 individuals, firms or corporations", engaged in the transportation of freight by motor vehicle within the City of Chicago, "who are similarly situated with the Defendants" (meaning the respondent) "as to matters and things complained of herein" (R. 10).

Moreover, the City of Chicago, the petitioner herein, as well as every state and municipality in the entire nation,

will be affected by the decision because the question of their power to tax purely local occupations is directly involved. The consequence of the erroneous decision of the Supreme Court of Illinois, if it were to receive the implicit sanction of this Court by not being disapproved, is to strip the several states and their municipal subdivisions of the power to levy occupational taxes upon purely local business in every case where it integrates itself with interstate commerce so as to become inseparably intertwined therewith, despite a total absence of proof that an undue burden upon interstate commerce actually results. This decision, if permitted to stand, will provide a ready avenue for the escape of purely local business from local taxation, and would destroy the well established line of demarcation between Federal and State power in the field of taxation.

It is respectfully submitted, therefore, that the case presents a substantial Federal question of sufficient public importance to require its resolution by this Court.

Conclusion.

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be allowed, and that the judgment of the Supreme Court of Illinois should be reversed.

Respectfully submitted,

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IN THE

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No. 23

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REPLY BRIEF FOR PETITIONER.

PRELIMINARY STATEMENT.

A motion is pending in this Court (on stipulation filed) that all petitions and briefs filed by both parties in Case No. 493 (1950 Term) and Case No. 644 (1951 Term) shall stand as the briefs of the parties in present Case No. 23. Respondent has seen fit, however, to file a comprehensive brief on the merits in Case No. 23 subsequent to the date when petitioner's brief on the merits would ordinarily have been filed. This has made it necessary for petitioner to file a reply brief which in form and substance (except as to designation) satisfies all of the requirements of a petitioner's main brief. It is respectfully suggested, there-

fore, that the record and briefs filed in Case No. 23 are adequate for a consideration by this Court of all of the issues involved.

The procedural background to Case No. 23 is as follows:

In Case No. 493, petitioner applied for certiorari to review the judgment entered by the Supreme Court of the State of Illinois on May 18, 1950 (R. 29-30). This Court, on April 23, 1951, granted certiorari, vacated the judgment, and remanded the cause to the Illinois Supreme Court with directions to clarify whether the judgment rested on an adequate non-federal ground or whether the decision of a federal question was necessary to the judgment rendered (R. 37-38).

The text of the order of this Court granting certiorari, vacating the judgment, and remanding the cause for clarification of the ground of decision, is set forth in Appendix B hereto, p. 54; and is officially reported in 341 U. S. 913-914; 95 L. Ed. 1349-1350.

The mandate which was issued out of this Court upon its grant of certiorari is included in the Printed Transcript of the Record (R. 37-38).

Pursuant to this mandate, which was dated May 29, 1951, the Supreme Court of Illinois, on December 17, 1951, entered a new (although similar) final judgment (R. 41-42), and filed a clarifying opinion (R. 39-40).

In Case No. 644, petitioner again applied for certiorari, this time to review the judgment entered by the Illinois Supreme Court on December 17, 1951 (R. 41-42), and this Court, on May 5, 1952, again granted certiorari and transferred the case to the summary docket (R. 48). (See, also, 343 U. S. 940, 96 L. Ed. 676.)

OPINIONS BELOW.

The opinion rendered by the Supreme Court of Illinois on May 18, 1950, prior to the grant of certiorari by this Court in Case No. 493, is included in the Printed Transcript of the Record (R. 22-29); is set forth in full in Appendix A hereto, pp. 45-54; and is officially reported in 406 Ill. 286, 94 N. E. (2d) 195.

The clarifying opinion rendered and filed by the Supreme Court of Illinois on December 17, 1951, pursuant to the mandate of this Court, also appears in the Printed Transcript of the Record (R. 39-40); is set forth in Appendix C hereto, pp. 55-56; and is officially reported in 409 Ill. 480, 101 N. E. (2d) 205.

JURISDICTIONAL STATEMENT.

(1) Statute relied on as giving jurisdiction.

Subdivision (3) of Section 1257 of Title 28, Judiciary and Judicial Procedure, is relied upon as giving jurisdiction to the Supreme Court of the United States to review the final judgment of the Supreme Court of Illinois in this cause. It reads as follows:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> * * * * * * *
>
> "(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority

exercised under, the United States. June 25, 1948, c. 646, 62 Stat. 929." (U. S. C. A., Title 28, Sec. 1257 (3).)

A municipal ordinance has been held to be a "State statute" within former Section 344 of Title 28, from which the foregoing provision is derived. (*Jamison* v. *Texas*, 318 U. S. 413, 414; 87 L. Ed. 869; *King Mfg. Co.* v. *Augusta*, 277 U. S. 100, 102-114; 72 L. Ed. 801.)

(2) Statement of the Case.

Petitioner seeks a review of the final judgment of the Supreme Court of Illinois (R. 41-42) holding unenforceable as against respondent corporation, on the sole ground of its being obnoxious to the commerce clause of the Federal Constitution (R. 39-40), an ordinance of the City of Chicago levying an occupation tax upon all persons engaged in the transportation of freight by horse-drawn or automotive vehicle for hire or reward within the city (R. 5-7). The amount of the tax ranged, for horse-drawn vehicles, from a minimum of $2.75 annually for each one-horse vehicle to a maximum of $13.75 annually for each six-horse vehicle, and, for automotive vehicles, from a minimum of $8.25 annually for each vehicle of not more than two-ton capacity to a maximum of $16.50 annually for each vehicle exceeding six-ton capacity, and was imposed in respect of each vehicle used or operated in such "within the city" transportation (R. 6). The case here involves only automotive vehicles.

The ordinance in question is Chapter 163 of the Municipal Code of Chicago, and was duly enacted by the City Council of the City of Chicago on January 14, 1949 (R. 5-7). Its official text may be found in the Journal of Proceedings of the City Council of the City of Chicago, Illinois, for

January 14, 1949, at page 3679, and its provisions are also set forth *verbatim* in Appendix D hereto, pp. 56-58.

Respondent corporation transports freight by motor vehicle both in interstate and intrastate commerce. Its intrastate operations include both intercity transportation (*i.e.*, to and from points within the City of Chicago from and to points outside the city but within the state), and intracity transportation (*i.e.*, where the points of origin and destination are both within the corporate limits of the City of Chicago (R. 8). Respondent refused to comply with the ordinance (R. 8), and petitioner instituted a quasi-criminal action in the Municipal Court of the City of Chicago, charging the respondent with engaging in the transportation of freight within the city without a license, in violation of the ordinance (R. 1). The cause was heard by the trial court without a jury (R. 2), the respondent was found not guilty and ordered discharged (R. 2), and the City of Chicago took a direct appeal to the Supreme Court of Illinois (R. 2-3), which affirmed the judgment (R. 41-42).

Upon the trial of the cause, the parties filed a stipulation (R. 4-10) which, with certain oral testimony of the executive vice president of the respondent company (R. 11-13), constitutes the entire evidence in the case.

It appears from the stipulated facts that the respondent company operates about 1,200 motor vehicles in the transportation of freight in interstate and intrastate (including intracity) commerce (R. 12). It does not use any horse-drawn vehicles in the conduct of its business (R. 8). It operates as a contract carrier of commodities, and serves shippers, connecting carriers and forwarding companies either (a) by leasing its trucks with drivers to shippers by the hour, day, week or year, or other period; (b) by making contracts with shippers to perform all trucking for a fixed

period; (c) by giving occasional service or handling single shipments in local cartage for any shipper at a rate per hundred pounds, per ton, per piece, or other unit; (d) by distributing pooling cars; and (e) by rendering collection and delivery service, station or substation service for rail, water and highway motor carriers and forwarding companies either under contract or on some other basis (R. 7).

The stipulation also contains the express factual recital that each vehicle of the respondent, during every single day of the year, carries on it, along with property which never leaves the city, property destined to points outside the city but within the state, as well as property destined to points outside the State (R. 9). [This fact is of crucial significance, because it establishes that the quantum of respondent's local operations is substantial.]

It was further stipulated that the respondent company had not complied with the provisions of the City ordinance in question, and had not secured licenses as provided therein (R. 8). The stipulation also contains an express reservation by the respondent to object to the ordinance "on the ground that said Ordinance is void and of no legal effect because it is in conflict with the Constitution of the United States" (R. 4). [This is important in connection with the issue, (which respondent has seen fit to reargue in its brief in Case No. 23, notwithstanding the granting of certiorari in Case No. 493 and in Case No. 644), whether the judgment of the Illinois Supreme Court necessarily rests upon the decision of a federal question.]

The executive vice president of respondent company testified that he did not know how much of respondent's operations, or of the shippers to whom respondent furnishes trucks, were interstate, intrastate or intracity; that the company did not keep any records to determine the propor-

tion of interstate as compared to intrastate and intracity operations; and that as far as the entire operations of the company were concerned, there was no way in which it could determine the proportion of intracity as compared to interstate and intrastate transportation (R. 12-13).

The same witness also testified that his company was not able to separate its interstate, intrastate and intracity operations; that it could not "without considerable hardship" withdraw from its interstate business and continue in its intrastate business; and that its interstate, intrastate and intracity business was not divisible (R. 11).

(3) Some inaccuracies in Respondent's Statement of the Case.

Repondent's Brief (p. 2) states that "It is admitted by the petitioner that the tax in question * * * is an occupational or privilege tax levied upon instrumentalities used by the respondent in interstate, intrastate and intercity business". This is inaccurate and misleading in a crucial particular. The tax is not levied upon the vehicle, but upon the person engaged in using the vehicle; nor is the tax imposed upon instrumentalities (vehicles) because of their use in interstate commerce, but only because of their use in intracity commerce.

Respondent's Brief also states (p. 4) that respondent's operations are so diversified that "one of its trucks" may during any day haul freight in both intracity, intrastate, and interstate commerce, and, during every single day of the year, carries along with property "which never leaves the State", property destined to and from points outside of the State of Illinois. This is also inaccurate, because the stipulation is not merely that "one of its trucks", but that "Each vehicle of defendant" during every single day of the

year carries on it along with property "which never leaves the city", (not "which never leaves the State"), property destined to some point outside the City of Chicago either within or without the State of Illinois (R. 9). Thus, respondent's brief would make it appear that "one" or "some" of respondent's trucks carries some purely intracity commerce daily, whereas the stipulation recites that "each" of defendant's vehicles does so.

(4) Statement as to whether the judgment below necessarily rests upon the decision of a federal question.

In view of respondent's admitted violation of the ordinance (R. 8), and of its express reservation of right to object thereto on the ground of its invalidity and unenforceability because in conflict with the Federal Constitution (R. 4), it follows that the trial court, in finding the defendant not guilty (R. 2) and entering judgment on said finding (R. 2), necessarily determined that the ordinance was violative of the commerce clause of the Federal Constitution. As further evidence and clarification of the ground of its decision, the trial court issued a certificate reciting that there was involved in the cause, and in the final judgment therein, the validity of a municipal ordinance (R. 2-3).

The Supreme Court of Illinois, in its main opinion, took a similar view of the basis of the trial court's decision, saying:

> "The finding of the trial court for the defendant is apparently based on the ground that the application of the ordinance to the defendant carrier's business would create a burden upon interstate commerce and that, therefore, the defendant is exempt from the provisions of the carters ordinance of the city of Chicago" (R. 24).

In the Brief and Argument for Appellant, filed in the Supreme Court of Illinois, petitioner urged, among other errors, the following:

> "(6) The trial court erred in holding as a matter of law that the ordinance in question was in violation of the commerce clause of the Federal Constitution as an interference with or a burden upon interstate commerce" (R. 16).

In the Brief and Argument for Appellee, respondent contended in the Supreme Court of Illinois (a) that the "intrastate, interstate and local" operations of the respondent "cannot be separated and the ordinance is therefore in violation of the commerce clause of the Federal Constitution" (R. 19), and (b) that the ordinance in question "constitutes an interference with, and a burden on Interstate Commerce in violation of the Federal Constitution" (R. 19).

In its Reply Brief, petitioner urged that the ordinance, being confined to purely intracity transportation, neither interfered with nor burdened interstate commerce (R. 20), and, further, that a showing of inseparability between the interstate and intrastate operations of respondent was not sufficient to establish invalidity of the ordinance under the commerce clause of the Federal Constitution, there being no showing whatsoever that the imposition of the tax under the ordinance actually resulted in an undue burden upon respondent's interstate operations (R. 20-21).

It appears clearly from the main opinion of the Supreme Court of Illinois (R. 22-29), that the judgment of that court (R. 29-30) was based upon its holding that the ordinance in question violated the commerce clause of the Federal Constitution and was, therefore, invalid and unenforceable as against the respondent. The opinion states that, in view of the decision on the interstate commerce question, "it is

not necessary to consider the other arguments made" (R. 29).

Although the Supreme Court of Illinois construed the ordinance, and the tax prescribed thereby, as limited to purely intracity transportation (R. 25), it nevertheless held the ordinance unenforceable as an impermissible interference with the Federal commerce power on the sole ground that respondent's interstate and intrastate (including intracity) operations were inseparable (R. 29).

This factor of "inseparability" was held sufficient, without more, to render the ordinance violative of the commerce clause of the Constitution of the United States, although there was no showing whatever that the tax levied by the ordinance would or did in practical effect impose an undue burden upon respondent's interstate operations (R. 29).

Inasmuch as the Supreme Court of Illinois recognized that the burden of proving invalidity of the ordinance under the commerce clause was upon the respondent (R. 26),—and this is, indeed, the true rule (*Pennsylvania Railroad Co.* v. *Knight*, 192 U. S. 21, 27; 48 L. Ed. 325),—the decision of the Supreme Court of Illinois is tantamount to a holding that the existence of undue burden is made out by a mere showing of inseparability. This, we respectfully submit, constitutes an erroneous ruling upon an important and substantial Federal question, and brings this case within the certiorari jurisdiction of this Court.

In its Petition for Rehearing addressed to the Illinois Supreme Court, petitioner expressly pointed out that the Supreme Court of Illinois had overlooked the controlling point that proof of inseparability, without more, was insufficient to invalidate the ordinance as violative of the commerce clause of the Federal Constitution, and that its decision was erroneous because there was no proof or even

any attempt to show that the tax levied by the ordinance did in fact impose an undue burden upon respondent's interstate business (R. 31).

Upon consideration of our earlier petition for the writ of certiorari in Case No. 493, this Court granted certiorari, vacated the judgment of the Supreme Court of Illinois, and requested that court to clarify the ground of its decision by showing whether its judgment rested on an adequate and independent state ground, or whether the decision of a Federal question was necessary to the judgment rendered (R. 37-38; 341 U. S. 913).

Pursuant to this Court's mandate, the Supreme Court of Illinois issued a clarifying opinion (R. 39-40), and again entered final judgment affirming the judgment of the trial court in favor of respondent (R. 41-42). This clarification sets at rest any doubt that might previously have existed as to the basis of the earlier judgment of affirmance, because it expressly declares that the basis for the present judgment is the court's conclusion that the commerce clause of the Federal Constitution prevents a municipal tax, otherwise valid because levied in respect of local commerce only, from being applied to respondent's purely local cartage operations because, *and only because,* they are inseparably linked with respondent's interstate business (R. 39-40).

Thus, it it is respectfully suggested, the question of the validity of the ordinance in question under the commerce clause of the Federal Constitution was squarely involved in the cause, and was properly raised, presented and preserved for review throughout every stage of the proceedings; that, furthermore, the decision of that question by the Supreme Court of Illinois constituted the necessary basis of the final judgment of that court, and is properly before this Court for review on writ of certiorari.

The question whether or not a state taxing statute (or city ordinance) is in violation of the commerce clause of the Constitution of the United States is a Federal one, and within the review jurisdiction of this Court. (*Pullman's Palace Car Co.* v. *Pennsylvania*, 141 U. S. 18, 21-22, 35 L. Ed. 613; *Western Union Telegraph Co.* v. *Alabama State Board of Assessment*, 132 U. S. 472, 33 L. Ed. 409.)

Several cases of more recent date in which this Court has assumed jurisdiction to review final judgments of state courts of last resort which have involved the question whether a state taxing statute (or city ordinance) was violative of the commerce clause of the Federal Constitution, are: (*Pacific Telephone and Telegraph Company* v. *Washington Tax Commission*, 297 U. S. 403, 80 L. Ed. 760; *Aero Mayflower Transit Co.* v. *Board of R. R. Commrs. of Montana*, 332 U. S. 495, 92 L. Ed. 99; *Central Greyhound Lines, Inc.* v. *Mealey*, 334 U. S. 653, 92 L. Ed. 1633; *Interstate Oil Pipe Line Co.* v. *Stone*, 337 U. S. 662, 93 L. Ed. 1613; *Capitol Greyhound Lines* v. *Brice*, 339 U. S. 542, 94 L. Ed. 1053; *Spector Motor Service, Inc.* v. *O'Connor*, 340 U. S. 602, 95 L. Ed. 573.)

The construction of the ordinance by the Supreme Court of Illinois as confined to local transportation and as not intending to tax interstate business (R. 25), and its holding that the commerce clause of the Federal Constitution stands as a bar to the enforcement of the ordinance against respondent on a mere showing of inseparability without any evidence of undue burden, represent adjudications upon two separate and distinct issues,—the former a matter of local law as to which the state court's determination is conclusive; the latter a federal question arising under the commerce clause of the Federal Constitution of which this court is the final arbiter.

Nor can the Court's decision properly be regarded as merely embodying a ruling on the question of the sufficiency of the evidence to establish the existence of undue burden, since evidence of inseparability constitutes no evidence of undue burden. The question of the sufficiency of the evidence does not arise upon a total failure of proof. As this Court pointed out in *Pacific Telephone & Telegraph Co.* v. *Washington Tax Commission*, 297 U. S. 403, 80 L. Ed. 760, the fact that the intrastate and interstate phases of a business may be "inextricably intertwined" does not necessarily establish that a local tax upon the former casts an undue burden upon the latter.

Respondent's Brief (pp. 9-14) makes a distinct and separate issue of the problem of whether the state court judgment necessarily rests upon the decision of a federal question. We shall, therefore, include it in our list of "Questions Presented and Specification of the Assigned Errors intended to be urged", notwithstanding that this Court, by its two grants of certiorari, has already determined that its certiorari jurisdiction has been properly invoked in this case.

QUESTIONS PRESENTED, AND SPECIFICATION OF THE ASSIGNED ERRORS INTENDED TO BE URGED.

I. Is the judgment of the Supreme Court of Illinois necessarily based upon the decision of a federal question?

(A). Does the court's construction of the ordinance as intending to tax only local commerce require the conclusion that persons engaged both in local and interstate commerce shall escape the tax entirely?

(B). Since the tax is expressly made applicable to "within the city" transportation, should not respond-

ent's local business be subject to the tax notwithstanding that it also engages in interstate commerce?

(C). Can there be found any language either in the text of the ordinance or in the main and clarifying opinions of the court, which can reasonably lead to the conclusion that the court had construed the ordinance to limit the application of the tax to vehicles used in local commerce exclusively?

(D). Did not the court base its holding of inapplicability of the ordinance to respondent upon the proposition that the imposition of a tax upon local commerce necessarily constitutes an undue burden upon interstate commerce where the two are inseparable?

(E). Did not the court set up the commerce clause as a bar to the local taxation of respondent's local business because of it inseparability from respondent's interstate business, and does this not constitute the decision of a federal question upon which the judgment below is necessarily based?

[The foregoing main and subsidiary questions go to the jurisdiction of this Court to review the judgment below. The following questions go to the merits of the case.]

II. Has a true case of "inseparability" between respondent's local and interstate operations been established on this record?

(A). Whether proof that the same vehicles carry mixed loads (interstate as well as purely local freight) for the same or different shippers at the same time, and that it is inconvenient or impracticable to allocate specific vehicles for each type of operation or to keep separate records of the interstate and intrastate phases of the business or of the revenue derived therefrom,

is sufficient to establish a true case of "inseparability" under the decisions of this Court?

(B). As a corollary: Can persons engaged both in interstate and intrastate transportation escape local taxation upon their intrastate operations by the simple expedient of having the same vehicles carry such mixed loads for the same or different shippers at the same time, and by failing to keep (or to require the contract users of their transportation facilities to furnish) separate records of their interstate and intrastate business or of the revenue derived therefrom?

III. Assuming a sufficient showing of impossibility or impracticability of separation between the interstate and intrastate operations of the respondent company, is such inseparability sufficient to invalidate the municipal tax upon respondent's purely local business as an undue burden upon interstate commerce, in the absence of any proof that such local tax does or will actually result in unduly burdening respondent's interstate operations?

IV. Where the quantum of local business is sufficiently substantial, so that the municipal levy is fair and reasonable as applied thereto and not a disguised tax upon the interstate business, may the commerce clause be invoked as a bar to the local impost on the ground that the taxpayer's intrastate and interstate operations are so "inextricably intertwined" that the former can not be discontinued without also discontinuing the latter? Stated otherwise: Is not a fair and reasonable local tax upon local business unobjectionable under the commerce clause no matter how intermingled the taxpayer's local and interstate business?

V. Does a flat annual charge, reasonable in amount, levied in respect of each motor vehicle used (daily) by re-

spondent in intrastate freight transportation, become an undue burden upon interstate commerce by reason of the fact that the same vehicle is also used for interstate freight transportation, in the absence of any showing as to the relation, percentagewise, between such flat annual charge and the annual gross revenue from local business as to each vehicle so taxed?

VI. Does a local tax, so reasonable in amount as not to constitute an undue burden upon interstate commerce, become obnoxious to the commerce clause of the Federal Constitution merely because such tax is in the form of a flat annual charge in respect of each vehicle used in intrastate commerce instead of measured by a percentage of the gross receipts from such local commerce?

VII. In view of a total absence of evidence of undue burden, should not the Supreme Court of Illinois have remanded the cause for the taking of proof on that issue or, in the alternative, should not the ordinance have been accorded the presumption of validity and sustained, instead of held invalid on an inadequate record?

VIII. In view of the stipulated fact that respondent's intrastate operations are substantial in amount, [each of respondent's vehicles carrying some intracity commerce on every single day during the year (R. 9)], does not the record here conclusively establish the validity of the local tax, under the commerce clause, as applied to the respondent, and require a reversal of the judgment below?

SUMMARY OF ARGUMENT.

I.

The Supreme Court of Illinois decided a federal question which constitutes the necessary basis of the judgment below.

While the state court construed the ordinance as confining the tax imposed thereby to vehicles used in local commerce, it did not construe it as limited to vehicles used in local commerce exclusively. Indeed, the opinion expressly recognized that the ordinance did not exempt the respondent from taxation upon its purely local business merely because it was also engaged in interstate commerce.

The court based its holding of inapplicability of the ordinance to respondent upon the express ground that respondent's interstate and local operations were inseparable.

The state court judgment is necessarily premised upon the proposition that where inseparability between local and interstate business is shown, a local tax upon the local business is obnoxious to the commerce clause as an undue burden upon interstate commerce, notwithstanding the absence of any evidence that such tax does in fact constitute such a burden.

The state court's construction of the ordinance as intending to tax only local business, and its holding that its application to respondent would unduly burden interstate commerce because of the inseparability between respondent's local and interstate operations, represent adjudications upon two separate and distinct issues; the former a matter of local law as to which the state court's determination is conclusive, the latter a federal question of which this Court is the final arbiter.

II.

The decision of the Supreme Court of Illinois that a showing of inseparability between the interstate and intrastate phases of respondents business was sufficient to invalidate the municipal tax upon its local business as an undue burden upon interstate commerce, without any showing whatever that such local tax actually produced such a result, is not in accord with the applicable decisions of this Court.

Respondent has not made out a true case of inseparability, but even if it has done so, the state court judgment is erroneous because inseparability alone does not establish undue burden.

This Court has held that a tax upon local business is not violative of the commerce clause, notwithstanding that the taxpayer's local and interstate business are so inextricably intertwined that the taxpayer could not abandon its local business, in order to escape the tax, without also withdrawing from its interstate business, where the local tax did not, in its practical consequences, cast an undue burden upon the taxpayer's interstate business. (*Pacific Telephone and Telegraph Co.* v. *Washington Tax Commission*, 297 U. S. 403, 80 L. Ed. 760.)

There is no evidence whatsoever in the case at bar that the tax prescribed by the ordinance, if held applicable to respondent, would, in its practical consequences, unduly burden respondent's interstate operations.

That the tax imposed by the ordinance is a flat annual charge per vehicle instead of measured by gross income from local business does not convert the tax into a direct levy upon an instrumentality of interstate commerce or a

charge for the doing of interstate business. The tax is sufficiently moderate in amount, and the quantum of respondent's local business sufficiently substantial, to render untenable any claim that the ordinance represents a disguised attempt to unduly burden interstate commerce.

That a taxpayer's local and interstate business are so inseparable that he cannot escape the local tax by withdrawing from his local business without also withdrawing from his interstate business does not *ipso facto* constitute the local tax a burden upon his interstate operations. The test of undue burden is not inseparability, but the practical consequences of the local tax upon the taxpayer's interstate business.

The tax imposed by the ordinance is not laid directly upon the vehicle, but upon the carrier in respect to each vehicle used in local commerce. And since each vehicle is admittedly used by respondent daily not only in interstate but also in local commerce, the tax may not properly be stigmatized as an impost upon an instrumentality of interstate commerce, especially since it is solely with respect to the use of the vehicle in local commerce that the tax is imposed.

This Court has repeatedly declared that the validity of a local tax will be judged by its results, not its formula, and that the tax will be sustained if limited to local business and so moderate in amount as not to be vulnerable to the charge that it is a disguised attempt to tax interstate commerce.

Respondent has not shown that the moderate schedule of flat annual charges per vehicle based upon its load-carrying capacity is in excess of a reasonable fee for the privilege of its use in intracity commerce, which purely local use is shown by the record to be substantial. Hence,

no portion of the tax can properly be claimed to constitute a charge for the privilege of using the vehicle in interstate commerce.

In view of the increasing integration of local and interstate business, the power of a state or municipality to tax the commerce carried on within its own borders should not be denied on a mere showing of inseparability, especially where, as in the case at bar, the local tax is moderate in amount, and fair and reasonable in relation to the quantum of local business present in the amalgam of combined operations.

ARGUMENT.

I.

The Supreme Court of Illinois decided a federal question which constitutes the necessary basis of the judgment below.

What we have already said under subdivision (4) of our Jurisdictional Statement (pp. 8-13, *ante*) sufficiently shows that the judgment below necessarily rests upon the decision of a federal question. We shall simply reply to the contentions of the respondent on this jurisdictional issue.

Respondent admits (its Brief, p. 4) that it requested the Supreme Court of Illinois to construe the ordinance so as to include "within the city" segments of interstate shipments. Such a construction would, of course, have invalidated the ordinance (at least to that extent) as an attempt to lay a tax directly upon interstate commerce. The Supreme Court of Illinois, however, did not so construe the ordinance, but held that shipments "within the city" meant shipments which began and ended within the corporate limits of the City of Chicago. This construction is, of course, binding on this Court. Concededly, also, in so construing the ordinance, the Supreme Court of Illinois did not decide a federal question.

Respondent contends, however, (its Brief, pp. 9-10), that this construction of the ordinance serves as an adequate non-federal ground for the judgment below. What respondent overlooks in this connection is that the Supreme Court of Illinois did *not* construe the ordinance as limited to carriers who engage in local commerce *exclusively*. On the contrary, it is clear both from the principal opinion

(R. 22-29) and from the clarifying opinion (R. 39-40) that the ordinance was construed as not exempting from the local tax vehicles used in both kinds of commerce, if separable. The opinion of the Supreme Court of Illinois expressly states (R. 25):

> "As contended by the city, there is no question but what a license tax may be imposed upon the defendant for its intracity business."

The opinion then referred to this Court's decision in *Osborne* v. *Florida*, 164 U. S. 650, where the state court had construed a state statute imposing a license tax on business done "within the city" (just as in the ordinance at bar) as confined to local, and as excluding interstate, business (R. 25). The opinion then appraises the decision in *Osborne* v. *Florida*, 164 U. S. 650, as follows (R. 25):

> "The case is authority for the rule that a statute so construed does not exempt the express company from taxation upon its business which is solely within the State, even though at the same time the same company may do a business which is interstate in character."

Had the court construed the ordinance as confined to carriers who engage in local commerce exclusively, it would have held the ordinance inapplicable to respondent irrespective of the separability or inseparability between its local and interstate commerce, and there would have been no need for the court to go into the question of undue burden or to hold that undue burden is established when inseparability is shown. Yet nothing is clearer than that the court did not base its ultimate decision upon the construction which it put upon the ordinance but upon the proposition that the inseparability between respondent's local and interstate business conferred an interstate character on respondent's entire operations and rendered even the local business immune to the tax.

Thus the opinion states (R. 29):

> "The defendant cannot separate its loads, nor can it discontinue any part of the service. Under these facts, we must conclude that the defendant is engaged in interstate commerce within the meaning of that term and is not subject to the license tax here in question."

Then, to show that this is the sole ground of decision, the opinion continues (R. 29):

> "Under the view we have taken in this cause, it is not necessary to consider the other arguments made by the appellant and appellee."

The subsequent clarification of the opinion, pursuant to the mandate of this Court, confirms beyond all doubt (1) that the Supreme Court of Illinois did not construe the ordinance as exempting vehicles from the tax merely because they were engaged both in local and interstate commerce, whether separable or not, and (2) that the decision of the court that the ordinance was inapplicable to respondent's business rests entirely upon the court's conclusion that the commerce clause precluded the imposition of the local tax even upon respondent's purely local business because of the inseparability between respondent's local and interstate operations (R. 39-40). This, we respectfully submit, is clearly a federal question which this Court has the ultimate power to decide.

The interpretation which respondent is seeking to place upon the state court's decision is so utterly untenable that it would, if adopted, impute to the Illinois Supreme Court an intent to interpose, arbitrarily, an unfounded and unsupportable non-federal ground of decision as a mere device to prevent the review by this Court of the federal question upon which the state court's judgment necessarily rests. Such an imputation is unwarranted, nor will this Court

permit such an evasion of its review jurisdiction in any event. (*McCoy* v. *Shaw*, 277 U. S. 302, 303; 72 L. Ed. 891, 892; *Ancient Egyptian Arabic Order, etc.* v. *Michaux*, 279 U. S. 737, 745; 73 L. Ed. 931, 936.) And this Court has held that it will determine for itself whether the state court judgment is based on a matter of purely local concern or necessarily rests upon the decision of a federal question. (*Vandalia Railroad Co.* v. *State of Indiana ex rel. City of South Bend*, 207 U. S. 359, 367; 52 L. Ed. 246, 248; *Angel* v. *Bullington*, 330 U. S. 183, 189; 91 L. Ed. 832, 836.)

The several propositions asserted by respondent at pages 13-14 of its brief, while they may correctly state the law, are not applicable here and hence furnish no basis for any contention that this Court lacks jurisdiction to review the judgment below. Thus, while it is true that the case also presented non-federal questions, it is clear from the opinion that none of these was made a ground of decision. It is submitted, therefore, that respondent's claim that the decision rests upon a non-federal ground independently sufficient to support the judgment is entirely without foundation.

The presence of additional non-federal questions in the case constitutes no bar to a review by this Court where, as here, the decision of the state court is based solely upon the federal question presented. It is well settled that where the state court explicitly bases its decision solely upon a determination of the federal question, this Court will review the case even though the state court, consistently with the record, might have based its decision upon adequate non-federal grounds. (*Steele* v. *Louisville & Nashville Railroad Co.*, 323 U. S. 192, 197; 89 L. Ed. 173; *Indiana ex rel. Anderson* v. *Brand*, 303 U. S. 95, 98; 82 L. Ed. 685; *Grayson* v. *Harris*, 267 U. S. 352, 358; 69 L. Ed.

652; *Rogers* v. *Hennepin County*, 240 U. S. 184, 188-189; 60 L. Ed. 594.)

So, also, we do not dispute the proposition that this Court is bound by the construction placed upon the ordinance by the state court, but this does not mean that this Court is also bound by the state court's decision of the federal question forming the sole basis of that decision. This Court has frequently asserted that while it will accept the state court's construction of local legislation as conclusive, it will nevertheless examine for itself the federal question forming the basis of the state court's decision, and, indeed, is in duty bound to determine the federal question in accordance with its own judgment. (*Crew Levick Co.* v. *Commonwealth of Pennsylvania*, 245 U. S. 292, 294; 62 L. Ed. 295; *Storaasli* v. *State of Minnesota*, 283 U. S. 57, 62; 75 L. Ed. 839; *Kovacs* v. *Cooper*, 336 U. S. 77; 93 L. Ed. 513; *Henderson Bridge Co.* v. *City of Henderson*, 173 U. S. 592, 608-609; 43 L. Ed. 823).

In the *Crew Levick* case, for example, this Court accepted as conclusive the state court's construction as to the scope and meaning of the state statute there involved, but refused to follow the state court's decision of the federal question presented and reversed the judgment.

Likewise, in the following three cases, this Court recognized and accepted the binding force of the state court's construction of the state statutes involved, but nevertheless proceeded to decide the federal questions presented (their validity under the commerce clause) in conformity with its own views, affirming the state court judgment in the first cited case but reversing it in the other two. (*Pullman's Palace Car Co.* v. *Pennsylvania*, 141 U. S. 18, 21-22; 35 L. Ed. 613; *Western Union Telegraph Co.* v. *Alabama*, 132 U. S. 472, 474-475; 33 L. Ed. 409; *Illinois Central Railroad Co.* v. *Illinois*, 163 U. S. 142, 152-153; 41 L. Ed. 107.)

Respondent contends, further, (its brief, p. 14) that since the Supreme Court of Illinois construed the ordinance as applying only to intracity transportation, no federal question under the commerce clause was presented, citing in support of this proposition the case of *Erie Railroad Co.* v. *Purdy*, 185 U. S. 148, 46 L. Ed. 847. This contention is in effect nothing more than a reiteration of the untenable proposition that the construction of the ordinance, and not the decision of a federal question arising under the commerce clause, forms the basis of the judgment. We have already pointed out that the state court's construction of the meaning and scope of the ordinance and its decision as to whether it constituted an undue burden upon interstate commerce represent adjudications upon two separate and distinct issues, the former a matter of local law, the latter a question arising under the Federal Constitution.

Moreover, the case of *Erie Railroad Co.* v. *Purdy*, 185 U. S. 148, 46 L. Ed. 847, does not support the respondent, because, there, the state court had construed the local statute in favor of the railroad on the interstate commerce question involved, and this Court properly held that its review jurisdiction could not be invoked by the railroad by utilizing as a ground of jurisdiction the question which had been decided in its favor.

Upon all of the foregoing, it is respectfully submitted that the judgment below necessarily rests upon the decision of a federal question, and is properly before this Court for review on certiorari.

II.

The decision of the Supreme Court of Illinois that a showing of inseparability between the interstate and intrastate phases of respondent's business was sufficient to invalidate the municipal tax upon its local business as an undue burden upon interstate commerce, without any showing whatever that such local tax actually produced such a result, is not in accord with the applicable decisions of this court.

We respectfully suggest that the respondent has not made out a true case of inseparability. The fact that each vehicle frequently carries mixed loads (interstate as well as local) for the same or different shippers at the same time, and that it is inconvenient to allocate specific vehicles for each type of operation, does not establish that the respondent is unable to keep a record of the respective amounts of its interstate and local business and of the amount of revenue derived from each. Every shipment, whether in local or interstate commerce, necessarily is supported by a separate shipping document which specifies the point of origin, point of destination, the names of the shipper, carrier, and consignee, plus the nature, weight and value of the shipment. A periodic tabulation of these shipping documents would give to the respondent sufficient information to enable it to determine, with respect to each type of operation, the volume of freight carried, the amount of gross revenue, the cost of doing business, and the net profit. The claimed inability of the respondent to keep separate records of its interstate and local business, or of the respective revenue derived therefrom, flows not from any inherent impossibility to do so but from the particular method of doing business selected by the respondent and,

primarily, from the respondent's unwillingness to obtain and correlate the information at hand. The fact that a substantial portion of respondent's business consists of furnishing its vehicles and drivers to others does not present a case of unavailability of the data with respect thereto. Submission of necessary information can be made a condition of the arrangement between the respondent and the persons to whom it furnishes its transportation facilities and services. If the factor of inseparability is at all relevant to the issue of undue burden, we respectfully submit that since this Court is the final arbiter on the question of whether or not an undue burden exists in fact, it has the power to determine for itself whether a true case of inseparability has been established on this record.

Assuming, however, that there is adequate proof of inseparability, we respectfully submit the following: (a) that inseparability alone is not probative of undue burden in fact; (b) that, despite the inextricable intermixture of local and interstate commerce, a local tax on the local business is not *ipso facto* an undue burden on the interstate business; (c) that in view of the increasing integration of local and interstate business, mere inseparability, without more, can no longer be (if, indeed, it ever has been) an adequate basis for denying to a State or municipality the power to tax the commerce carried on within its own borders; (d) that if the local tax is moderate in amount, and fair and reasonable in relation to the quantum of local business present in the amalgam of combined operations, it will not be held to unduly burden interstate commerce in violation of the commerce clause.

In *Pacific Telephone and Telegraph Co.* v. *Washington Tax Commission*, 297 U. S. 403, 80 L. Ed. 760, this Court sustained the validity of a local taxing statute as against

the objection that it was obnoxious to the commerce clause of the Federal Constitution, notwithstanding that it was found that practical considerations would prevent the taxpayer from abandoning its intrastate business in order to escape the tax without also withdrawing from its interstate business, and that its interstate and intrastate operations were "inextricably intertwined" (p. 411). This Court there said: "No decision of this Court lends support to the proposition that an occupational tax upon local business, otherwise valid, must be held void merely because the local and interstate branches are for some reason inseparable" (pp. 415-416). This Court further pointed out that "if it [the local tax] burdens interstate commerce at all, it does so by reason of its consequences. This being so, a tax upon the local privilege only must be held valid in the absence of proof that it imposes an undue burden upon interstate commerce. 'The question of constitutional validity is not to be determined by artificial standards.' * * * The alleged indirect tax must be judged by its practical operation" (p. 413). (Brackets, and words enclosed therein, supplied.)

This Court then went on to examine the evidence as to gross operating revenue from each class of business, the relation between the two, and the economic impact of the tax upon each type of operation as well as upon the taxpayer's business as a whole; concluded that no undue burden on interstate commerce was shown; and sustained the validity of the tax under the commerce clause of the Federal Constitution notwithstanding an unavoidable inseparability between the taxpayer's interstate and intrastate operations (pp. 417-420).

In the case at bar there is no evidence whatever as to respondent's gross or net annual operating revenue, whether from interstate, intrastate, or total business, either

per vehicle or as a whole. Hence there is no basis in the record for the conclusion reached by the Supreme Court of Illinois that the tax prescribed by the ordinance in practical effect did or would unduly burden respondent's interstate operations.

The crucial error of the Supreme Court of Illinois in the decision here under review is that it held the mere fact of inseparability to be sufficient for invalidation of the ordinance under the commerce clause, without requiring any showing as to whether or not the local tax did in fact constitute an undue burden upon interstate commerce. This, we respectfully submit, is directly contrary to the decision of this Court in *Pacific Telephone and Telegraph Company* v. *Washington Tax Commission*, 297 U. S. 403, 80 L. Ed. 760.

The only material distinction between that case and the case at bar is that, there, the local taxing statute was measured by a percentage of gross receipts from intrastate operations, whereas the ordinance here involved prescribes a flat annual charge in respect of each vehicle used in intracity transportation.

The Supreme Court of Illinois, however, did not rest its decision that the ordinance was invalid under the commerce clause upon any distinction between a flat annual charge and a tax based upon gross receipts, but purely and solely upon the factor of inseparability between respondent's interstate and intrastate operations (R. 29, 39-40).

There is nothing in a flat annual charge (as distinguished from a tax measured by a fixed percentage of gross receipts) which is inherently offensive to the commerce clause. This Court has frequently sustained such flat fees imposed by local law as not constituting forbidden burdens upon interstate commerce. (*Morf* v. *Bingaman*,

298 U. S. 407, 412, 80 L. Ed. 1245; *Aero Mayflower Transit Co.* v. *Board of R. R. Commrs. of Montana*, 332 U. S. 495, 506, 92 L. Ed. 99; *Capitol Greyhound Lines* v. *Brice*, 339 U. S. 542, 94 L. Ed. 1053.) These same cases likewise sustain the measure and amount of the tax prescibed by the ordinance in question as fair and reasonable; nor, indeed, can the respondent here contend otherwise in the absence of any showing as to the relation between the amount of the annual tax and the amount of its annual revenue from local operations.

We are not unmindful of the general proposition that a state may not exact a tax for the privilege of engaging in interstate commerce, except as reasonable compensation for necessary and valuable services rendered, such as the use of state highways or other local facilities. The ordinance here involved scrupulously observes this limitation by expressly restricting its coverage to intracity operations. Hence the decisions of this Court invalidating local statutes or ordinances which attempted to impose taxes indiscriminately upon *all* vehicles, whether engaged exclusively in interstate commerce, or engaged exclusively in intrastate commerce, or engaged in both classes of commerce, are not germane to the present inquiry. Examples of such inapplicable decisions are the *Leloup*, *Sprout* and *Cooney* cases which are heavily relied on by respondent.

In *Leloup* v. *Port of Mobile*, 127 U. S. 640; 32 L. Ed. 311, (Resp. Br., p. 19), which is frequently cited as a leading case on the subject, the State of Alabama imposed an annual license tax of $225 "on telegraph companies", without restricting it to telegraph companies doing an intrastate business or to the intrastate business of companies doing both local and interstate business. This Court held the tax

invalid as a local impost upon the privilege of doing interstate commerce, saying (p. 647):

> "But it is urged that a portion of the telegraph company's business is internal to the State of Alabama, and therefore taxable by the State. But that fact does not remove the difficulty. The tax affects the whole business without discrimination. There are sufficient modes in which the internal business, if not already taxed in some other way, may be subjected to taxation, without the imposition of a tax which covers the entire operations of the company."

In *Sprout* v. *South Bend*, 277 U. S. 163, 72 L. Ed. 833, (Resp. Br., pp. 17-19), this Court pointed out that the Supreme Court of Indiana construed the taxing ordinance there involved as applying not only to busses engaged in intrastate commerce, and to busses engaged both in intrastate and interstate commerce, *but also to busses operated exclusively in interstate commerce.* This Court held the local occupation tax void under the commerce clause because the carrier could not escape the tax even if he confined himself to interstate business only (277 U. S. 163, at p. 171). The *Sprout* case was explained on that ground and distinguished in *Pacific Telephone and Telegraph Co.* v. *Washington Tax Commission*, 297 U. S. 403, at pp. 416-417.

The case of *Cooney* v. *Mountain States Telephone & Telegraph Co.*, 294 U. S. 384, 79 L. Ed. 934 (Resp. Br., pp. 19-21), is likewise distinguishable. There, also, the local taxing statute was held invalid because applying indiscriminately both to local and interstate business. The tax was imposed upon each telephone instrument used in furnishing telephone service in the State of Montana, and this Court adverted to the fact that it did not appear that the statute had been construed by the state court (294 U. S. 384, at p. 398). This Court also pointed out the distinction between

the two cases of *State* v. *Rocky Mountain Bell Telephone Co.*, 27 Mont. 394, 71 Pac. 311, where the state court construed the statute to apply only to telephone instruments used in purely intrastate business and held it to be valid, and *State* v. *Northern Pacific Express Co.*, 27 Mont. 419, 71 Pac. 404, where the state court held the occupation tax void because it applied indiscriminately to interstate as well as to local transportation. (294 U. S. 384, at pp. 388-389.) This court held the tax in the *Cooney* case invalid for the following explicit reasons (294 U. S. 384, at pp. 390-391):

> "No distinction is made between interstate and intrastate service.
>
> * * * * * * *
>
> "Again, there is no limitation as to use, control or operation in intrastate business.
>
> * * * * * * *
>
> "The tax is thus laid simply by reason of the fact that the company is furnishing telephone service and is based upon the number of telephone instruments used in that service without regard to its character whether intrastate or interstate.
>
> * * * * * * *
>
> "All the telephone instruments, not excepted, whether they are used in intrastate or interstate commerce and however the service is paid for, are left subject to the tax."

No such constitutional infirmity is present in the ordinance here involved which, in terms as well as by virtue of its construction by the Supreme Court of Illinois, applies only to vehicles employed in purely local transportation, i.e., where the point of origin and the point of destination are both within the corporate limits of the same city. The tax is levied solely in respect of such intracity operations; the amount exacted is not increased because of the interstate business done; and vehicles operated exclusively in interstate transportation are not subject to the tax.

There are several other cases, not cited by respondent, which bring out this crucial distinction between a local tax which is limited to local business and one which is imposed indiscriminately upon interstate commerce as well. In two cases involving city ordinances imposing flat annual charges upon motor freight vehicles, this Court held such local levies void under the commerce clause as applied to vehicles engaged exclusively in making hauls, which, although intra-city, constituted segments of interstate transportation, so that the tax was actually a direct impost upon interstate commerce. (*Barrett* (*Adams Express Co.*) v. *City of New York*, 232 U. S. 14, 31, 32, 34-35, 58 L. Ed. 483; *Platt* (*United States Express Co.*) v. *City of New York*, 232 U. S. 35, 58 L. Ed. 492). Distinguishable on identical grounds is the case of *People of the State of New York* v. *The Horton Motor Lines*, 281 N. Y. 196, 22 N. E. (2d) 338.

The controlling principle which would appear to run through the decisions of this Court on this subject is that the local statute or ordinance will be upheld as valid where it is strictly confined to local business, but will be held invalid only if it applies indiscriminately to all business whether local or interstate. We are here speaking, of course, of local occupation or privilege taxes, since local taxes imposed as reasonable compensation for the use of local highways or other facilities have been upheld even where imposed directly upon interstate business. (See the chart of decisions listed in the Appendix to the dissenting opinion of Mr. Justice Frankfurter, in which Mr. Justice Jackson joined, in *Capitol Greyhound Lines* v. *Brice*, 339 U. S. 542, 561; 94 L. Ed. 1053, 1066).

In the following cases, this Court sustained the validity of local tax legislation because strictly confined to local business. (*Osborne* v. *Florida*, 164 U. S. 650, 654, 655;

41 L. Ed. 586; *Pullman Company* v. *Adams*, 189 U. S. 420, 422; 47 L. Ed. 877; *Ewing* v. *City of Leavenworth*, 226 U. S. 464, 468-469; 57 L. Ed. 303.)

In the following cases, this Court held local tax legislation to be invalid because applying indiscriminately both to local and interstate business. (*Crutcher* v. *Kentucky*, 141 U. S. 47; 35 L. Ed. 649; *Williams* v. *Talladega*, 226 U. S. 404, 419; 57 L. Ed. 275.)

Respondent relies upon *Northern Pacific Ry. Co.* v. *Washington*, 222 U. S. 370, 56 L. Ed. 237 (Resp. Br., p. 19), which held that a crew operating a train carrying interstate and intrastate freight at the same time was subject to Federal *regulation* as to hours of service, notwithstanding that part of its load consisted of intrastate commerce. There is nothing in that decision involving the power of a State or municipality to *tax* the local business of a person who is also engaged in interstate commerce at the same time. The inapplicability of that decision to the case at bar stems primarily from the fundamental distinction between *regulation* and *taxation* in determining the propriety of the simultaneous co-exercise of federal and state power. Conflicting local and federal regulations, if attempted to be applied to a mixed train, would necessarily bring state and federal power into collision, and the paramount federal power over interstate commerce would require that the local regulation be held inoperative. *Taxation*, however, possesses a greater conformability and flexibility, permitting the co-exercise of federal and state power, each in its proper sphere, without the encroachment of the one upon the other, notwithstanding the inseparable commingling of federal and state subject-matter. The ordinance here is purely a revenue measure aimed only at the local operations of the respondent. It does not seek to tax any vehi-

cle in respect of its use in interstate commerce. If the local tax upon the local business is reasonable in amount, and is not a disguised attempt to impose a charge for the doing of interstate business, then the local taxing power operates within its proper sphere no matter how closely intertwined the interstate and local operations of the taxpayer may be. In these circumstances, the taxation of the local portion only of the intertwined mixture of both types of commerce cannot be said to be an encroachment upon federal power. We believe that this is a fairly accurate paraphrase of what this Court has said upon this subject.

The question still remaining is whether, as the respondent contends (Resp. Br., pp. 17-21), the local tax constitutes an undue burden upon interstate commerce because the respondent cannot feasibly discontinue its purely intrastate operations and still carry on its interstate business. The proof is very meager upon this point (R. 11); but, assuming that the record establishes that the respondent would have to cease business altogether if it gave up its local business (R. 27), does that circumstance render the respondent impervious to a fair and reasonable local tax upon its purely local business shown to be substantial in amount? This is the pivotal issue in the case, and we believe that this Court has answered the question in favor of the validity of such a tax under the commerce clause. According to our appraisal of the decisions of this Court on the subject, a local tax upon purely local business will not be held violative of the commerce clause, provided it does not discriminate against interstate commerce, is fair and reasonable in amount, and is not increased by the fact that interstate commerce is also engaged in; and the fact that the taxpayer needs the local business in order to be able to carry on its interstate business, far from being an

argument against the validity of the local tax, would seem to furnish an added ground for not permitting the taxpayer to escape the local tax upon his purely local business.

In *Pacific Telephone and Telegraph Co.* v. *Washington Tax Commission*, 297 U. S. 403, 80 L. Ed. 760, the State of Washington imposed an occupation tax upon persons engaged in intrastate business measured by a percentage of the gross income derived from such business. The taxing statute, as construed by the highest court of the state, did not purport to tax the privilege of doing interstate business. Two railroads and a telephone and telegraph company, each engaged both in intrastate and interstate commerce within the State of Washington, challenged the tax as an undue burden upon interstate commerce, and claimed specifically, among other things, that their local and interstate operations were so inseparable that they were unable to abandon the local business without also discontinuing the interstate business. The evidence fully supported this claim. As this Court stated (p. 411):

> "The trial court found, and the Supreme Court assumed, that practical considerations would prevent either of the railroads from abandoning its intrastate business without also withdrawing from the intrastate. And this was assumed to be true of the Telephone Company. The operations of the two classes of business are inextricably intertwined. In the main, they are carried on at the same time, by the same employees, with the same plant, equipment, and facilities."

This Court recognized that where interstate and intrastate commerce are served by the same instrumentalities of the carrier, "it is possible that a tax applied directly to the privilege of doing the local business may in fact burden the related interstate business" (p. 412). But, said the court, if the local tax burdens interstate commerce at all,

"it does so by reason of its consequences" (p. 413). "This being so, a tax upon the local privilege only must be held valid in the absence of proof that it imposes an undue burden upon interstate commerce" (p. 413).

It is true that this Court adverted to the fact that the tax was "not upon an instrumentality of interstate commerce" (p. 414), and that it differed from that involved in *Sprout* v. *South Bend*, 277 U. S. 163, 72 L. Ed. 833, where the tax was in the form of "a flat bus license fee" (p. 416). The Court pointed out, however, that the license fee was held void in the *Sprout* case, not because of its form, but because busses engaged exclusively in interstate commerce were also made subject to the tax, so that "Sprout, who was engaged in both classes of commerce, could not escape payment of the tax by confining himself to interstate business" (p. 417). This is not the case here. Vehicles used exclusively by respondent in interstate commerce are not subjected to the tax.

Nor is the tax prescribed by the ordinance laid directly upon the vehicle. It is a tax upon the carrier in respect of each vehicle used by it in local commerce. Moreover, each vehicle is not only an instrumentality of interstate commerce but of intrastate commerce as well, and it is solely in its character and use as an instrumentality of intrastate commerce that the tax is imposed. Thus there is no basis for the contention that the tax lays a direct burden upon an instrumentality of interstate commerce.

That the tax here is a flat annual charge per vehicle, rather than a tax measured by a percentage of gross receipts from local operations, does not render it any more burdensome to the respondent. Indeed, a tax based upon such latter formula would introduce insuperable complexities in its administration, as well as obstacles to the

taxpayer's attempt to comply therewith, which are obviated by the present flat annual charge upon each vehicle. According to the record here, respondent's executive vice president testified that respondent "does not keep any record to determine the proportion of interstate as compared to intrastate and local operations" (R. 12), and that "there is no way in which we can determine the proportion of local transportation as compared to interstate and intrastate" (R. 13). (Had the ordinance levied a tax based on a percentage of gross receipts from a carrier's intracity business, the respondent would undoubtedly have contended that under its necessary method of doing business the amount of the tax would be wholly unascertainable.) The Stipulation of Facts recites that there are more than 3,000 motor freight carriers in the City of Chicago "similarly situated" (R. 10). The City of Chicago was thus confronted with a difficult choice as to method, and it finally concluded that a flat annual tax, reasonable in amount, upon each vehicle used in intracity transportation, and in accordance with its load-carrying capacity, was a fair and legally permissible formula.

This Court has recognized the difficulties confronting States and municipalities in gearing local transportation taxes to relevant factors, and has declared that the validity of a local tax should be judged by its result, not its formula; that the tax will be sustained if not shown to be unreasonable in amount (*Capitol Greyhound Lines* v. *Brice*, 339 U. S. 542, 545; 94 L. Ed. 1053); and that the burden of proof in this respect is upon a carrier who challenges the validity of the tax (339 U. S. 542, at p. 548).

Respondent has not shown that the moderate schedule of flat annual charges per vehicle based upon its load-carrying capacity is in excess of a reasonable fee for the privilege of

its use in intracity commerce. Hence, no portion of the tax can be claimed to constitute a charge for the privilege of using the vehicle in interstate commerce. The ordinance, as construed, disclaims any such purpose, and the record wholly fails to show that its application to respondent will produce any such unconstitutional result.

Some of the recent decisions of this Court involving the question of the validity under the commerce clause of local taxing legislation, while not directly in point, are quite illuminative of the Court's approach to the problem.

In *Interstate Oil Pipe Line Co.* v. *Stone*, 337 U. S. 662, 93 L. Ed. 1613, this Court sustained a state privilege tax upon the transmission of oil by pipeline from producing points within the State to loading racks adjacent to railroads within the State, although accompanied by shipping orders from the producer or owner directing that the oil be transported to out-of-state destinations. Four members of this Court held the tax not violative of the commerce clause irrespective of whether or not the business taxed was interstate commerce, because the tax was not discriminatory, could not be repeated by any other state, did not require apportionment since the business taxed was all of the same nature, i.e., the transmission of oil within the State though destined to points outside the State; and did not purport to cover interstate activities carried on beyond the State's borders (337 U. S. at p. 668). One member of the Court concurred on the ground that the activity taxed was intrastate, i.e., operating a pipeline in intrastate commerce (337 U. S. at pp. 668-669). Four members dissented on the ground that the transmission of the oil to gathering points within the State for out-of-state shipment was wholly and entirely interstate commerce, the doing of which could not, under the commerce clause, be made subject to

a local privilege tax (337 U. S. at p. 669). It is significant to note, however, that the dissenting opinion nevertheless declares (337 U. S. at p. 679):

> "Where the corporate taxpayer conducts intrastate as well as interstate business, a franchise privilege or excise tax on the former is of course permissible."

The doctrine of the foregoing decision goes beyond what is necessary to sustain the validity under the commerce clause of the tax imposed by the ordinance in the instant case. Here, the tax is strictly confined to respondent's local business which constitutes a substantial portion of respondent's total operations, and there is no attempt to tax any interstate operations at all.

In the recent case of *Spector Motor Service, Inc.* v. *O'Connor*, 340 U. S. 602, 95 L. Ed. 573, a state tax on corporations, measured by the net income from business transacted within the State, was held invalid under the commerce clause as applied to a foreign corporation engaged exclusively in the interstate trucking of freight. The majority opinion pointed out that this was a local tax laid directly upon interstate commerce because the company was not engaged in intrastate commerce to any extent whatever. The Court said (pp. 606, 607-608):

> "The incidence of the tax is upon no intrastate commerce activities because there are none. Petitioner is engaged only in interstate transportation."
>
> • • • • • •
>
> "It is a 'tax or excise' placed unequivocally upon the corporation's franchise for the privilege of carrying on exclusively interstate transportation in the State."

The Court then made the following significant declaration (pp. 609-610):

> "This Court heretofore has struck down, under the Commerce Clause, state taxes upon the privilege of

carrying on a business that was *exclusively* interstate in character. [The emphasis is the Court's own.]

"Our conclusion is not in conflict with the principle that, where a taxpayer is engaged both in intrastate and interstate commerce, a state may tax the privilege of carrying on intrastate business and, within reasonable limits, may compute the amount of the charge by applying the tax rate to a fair proportion of the taxpayer's business done within the state, including both interstate and intrastate." (Citing cases.)

In the dissenting opinion, (in which three Justices joined), it was urged that the tax was valid because "nondiscriminatory, fairly apportioned and not an undue burden on interstate commerce" (p. 610). "Hence," said the dissent, "if appellant had been engaged in an iota of activity which the Court would be willing to call 'intrastate,' Connecticut could have applied its tax to the company's interstate business in the precise form which it now seeks to employ—a tax on the privilege of doing business in Connecticut measured by the entire net income attributable to the State, even though derived from interstate commerce" (pp. 610-611).

In the case at bar, the intrastate activity of the respondent consists of more than a mere "iota"; it is considerable and substantial, since each of respondent's vehicles carries some purely local freight "during every single day of the year" (R. 9).

Conclusion.

It would seem clear from all of the foregoing (1) that the judgment below necessarily rests upon the decision of a federal question, and (2) that the state court has decided that question contrary to the applicable principles enunciated by this court. It is accordingly respectfully submitted that the judgment of the Supreme Court of Illinois should be reversed.

Respectfully submitted,

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APPENDIX "A".

(Text of Opinion of Supreme Court of Illinois.)

Docket No. 31312—Agenda 16—March, 1950.

The City of Chicago, Appellant, v. The Willett Company, Appellee.

Mr. Justice Fulton delivered the opinion of the court:

This cause is heard here on direct appeal from a judgment of the municipal court of Chicago, finding the Willett Company, hereinafter referred to as defendant, not guilty in an action brought by the city of Chicago, which charged said defendant with engaging in the business of a carter within the city of Chicago without first having obtained or paid for a license therefor, in violation of chapter 163, Municipal Code of Chicago.

The cause was heard by the court without a jury. The parties filed a stipulation which, with certain testimony of the executive vice-president of the defendant company, constitutes the record in the cause. The trial court has certified that the validity of a municipal ordinance is involved.

Chapter 163 of the Chicago Municipal Code relates to carters and provides, in brief, that any dray type of vehicle driven or employed for the purpose of transporting or conveying property and merchandise within the city for hire or reward shall be deemed a cart within the meaning of the chapter, whether the vehicle be employed or hired from any public stand, public way, barn, garage, office or other place, or whether it be hired for the day, week, month or year. A license tax is imposed by the ordinance for each cart operated or controlled by every carter according to established fees and schedules.

The foregoing section as passed repeals the prior public carters ordinance as well as the furniture movers ordinance.

The defendant is an Illinois corporation, with its offices in Chicago, and was engaged in the business of transporting property by motor vehicles for hire in the city of Chicago. It operates as a contract carrier of commodities by motor vehicle from points and places within the State of Illinois, to points and places in the States of Indiana and Wisconsin. It further carries property within the city of Chicago from point to point under contract with various firms and other interstate and intrastate carriers entering the city. It holds itself out to serve the public and connecting carriers and forwarding companies generally up to the limit of its capacity, either (a) by leasing trucks with drivers to shippers by the hour, day, week or year or other period, (b) by making contracts with shippers to perform all trucking for a fixed period, (c) by giving occasional service or handling single shipments in local cartage for any shipper at a rate per hundred pounds, per ton, per piece, or other unit, (d) by distributing pooling cars, and (e) by rendering collection and delivery service, station or substation service, for rail, water and highway motor carriers and forwarding companies, either under contract or on some other basis. It was further stipulated that the motor vehicles operated by the defendant company in the course of a day's business would transport property from points within the city of Chicago to other points within the city of Chicago, from points within the city of Chicago to other points within the State of Illinois outside the city and from points in Chicago to other States surrounding Illinois and return. The defendant did not comply with the provisions of the carters ordinance, arguing that the ordinance was void and of no legal effect because it is in

conflict with the constitution of the United States; it is in conflict with the constitution of Illinois; it is in conflict with section 25-31 of the Revised Cities and Villages Act; and it is in conflict with the Illinois Truck Act of 1939, as amended.

The finding of the trial court for the defendant is apparently based on the ground that the application of the ordinance to the defendant carrier's business would create a burden upon interstate commerce and that, therefore, the defendant is exempt from the provisions of the carters ordinance of the city of Chicago.

The argument of the city of Chicago, the appellant here, is to the effect that by the terms of the ordinance, the license fee is restricted to carters doing business "within the city" and that the natural meaning of those words restricts the ordinance to intracity business and it cannot apply to interstate commerce. In support of this construction, appellant cites *Pacific Express Company* v. *Seibert*, 142 U. S. 339, and related cases. It further argues that the mere fact that the defendant company is engaged in interstate commerce, as well as intrastate and intracity, does not prevent the city of Chicago from imposing an occupation tax upon the defendant with respect to the purely intracity operations in which the defendant is admittedly engaged. To support this view, they cite cases such as *Osborne* v. *Florida*, 164 U. S. 650, *Pullman Co.* v. *Adams*, 189 U. S. 420, and like cases.

The defendant, on the other hand, cites *People* v. *Horton Motor Lines*, 281 N. Y. 196; *Northern Pacific Railway Co.* v. *Washington*, 222 U. S. 370, and *Sprout* v. *South Bend*, 277 U. S. 166, and similar cases for the proposition that the State or municipality cannot tax interstate commerce and, in situations such as the one before the court;

the tax violates the constitution of the United States and imposes a burden on interstate commerce. Both parties further argue as to the validity and invalidity of the ordinance in question.

It is the law in this State that this court will give a construction to a statute which will uphold its validity. The presumption is always in favor of the validity of an ordinance passed in pursuance of statutory authority. *City of Chicago* v. *Hebard Express and V..n Co.*, 301 Ill. 570.

It seems clear that the ordinance in question is not invalid by its terms, but could be held to be so by reason of its application to certain operators of carts, under the definition of the ordinance, in and around the city of Chicago. In other words, the ordinance is not invalid *per se*. It is only upon its application that a question of its constitutionality can arise. In *Pacific Express Co.* v. *Seibert*, 142 U. S. 339, it was said, "'Business done within this State' cannot be made to mean business done between that State and other States. We, therefore, concur in the view of the court below that it was not the legislative intention, in the enactment of this statute, to impinge upon interstate commerce, or to interfere with it in any way whatever; and that the statute, when fairly construed, does not in any manner interfere with interstate commerce." Thus, we find that the ordinance in question here, when construed in the light of the above language, is invalid only when it is applied to interstate commerce in its fullest sense.

As contended by the city, there is no question but what a license tax may be imposed upon the defendant for its intracity business. In *Osborne* v. *Florida*, 164 U. S. 650, a Florida statute was involved, imposing an annual license tax on all express companies doing business in the State. The Supreme Court of Florida has construed the statute

as not applying to interstate business, but only to local business, intrastate in character. The Supreme Court of Florida held the statute to be valid and the United States Supreme Court affirmed this holding, pointing out that the construction of the statute by the Supreme Court of Florida, as applying only to intrastate business, was binding upon it and would be accepted by it. The case is authority for the rule that a statute so construed does not exempt the express company from taxation upon its business which is solely within the State, even though at the same time the same company may do a business which is interstate in character.

However, the mere operation of trucks by the defendant "within the city" is not sufficient to determine the issues here. The legal effect of such operation must be considered.

As we have previously stated, the question here is one of application of the ordinance to the practical aspects of the hauling done by the defendant. In addition to arguing that the statute itself provides only for taxation upon persons transporting property "within the city" and that this deals only with intrastate business, the city of Chicago admits that where the intracity and interstate operations are inseparable, and the defendant cannot separate the two, nor continue to engage in business if separation is attempted, the argument as to the tax being a burden upon interstate commerce might apply.

It is only when a separation, in fact, of intrastate and interstate business exists that a like separation may be recognized between the control of the State and that of the nation. (See *Osborne* v. *Florida*, 164 U. S. 650, and *Pullman Co.* v. *Adams*, 189 U. S. 420.) The city argues, however, that no inseparability has been shown and that the defendant has not met the burden of proof in this

regard. The burden is on him who asserts that, although actually within, the traffic is legally outside the State; unless the interstate character is established, locality determines the question of jurisdiction. *Pennsylvania Railroad Co.* v. *Knight*, 192 U. S. 21.

The only evidence in this record is that of Howard L. Willett, Jr., who is the executive vice-president of the defendant company, and who stated on the stand that his company engaged in interstate, intrastate and local freight in the city of Chicago. It is not clear from the testimony or the questions asked of Willett whether or not he was familiar with the legal meaning of the term "intercity freight." It is apparent that the Willett Company operates from Chicago to surrounding States and in that manner engages in interstate commerce. They also engage as a contract carrier with other carriers coming into the city of Chicago from outside the State of Illinois. Whether or not by intercity operation Willett meant only that his trucks operated within the city of Chicago is another thing. The record is silent on that point.

He did testify that it was not possible to separate the intrastate freight from the interstate freight and the intercity freight hauled by the defendant. He further stated that defendant could not keep records of the shipments it made each day within the city of Chicago as to interstate, intracity or intrastate character.

It appears, insofar as we can ascertain from this record, that the defendant herein operates its trucks under contract with large industries, and, in the main, with other interstate carriers bringing property into the city of Chicago. The defendant itself does not determine what articles it shall carry on its trucks, but carries articles of all kinds, in interstate, intrastate and intracity traffic. It has no basis for

differentiating between the shipments which it carries on its trucks, but carries what is given it by the contractor, retailer or carrier with whom it is dealing, and on every load the three types of property are so intermingled as to be impossible of separation. It is apparent from these statements that the type of business done by the defendant herein is not one generally considered to be within the meaning of a carter's ordinance. The defendant does not keep records of the shipments because he does not handle the shipments as such. He does not go from house to house picking up shipments for delivery within the city of Chicago, but his entire business is concerned with hauling under contract for various firms, enterprises and other contracts carriers in the city of Chicago.

The cross-examination by the city of Chicago did not counteract the statements of this witness, and his statements as to nonseparability remained unchallenged in the record. All of the trucks, over 1200 of them, are engaged in the type of work which has been described. It was evident that the type of contracts the defendant has with other companies deal mainly with other carriers. The defendant has contracts with the Pennsylvania Railroad, Acme Fast Freight, Air Cargo, Ryerson Steel, U. S. Steel, Youngstown Steel, H. J. Heinz Company, Standard Brands Company, Glidden Company and others of that nature. All of these companies have either offices or plants in the city of Chicago.

On cross-examination the witness testified that insofar as the operations of the defendant were concerned, there was no possible way in which they could determine the proportion of local transportation as compared to intrastate and interstate, but he did state that in all the operations, every truck had some of all types of freight on it.

In view of the uncontradicted testimony in the record, it would appear that the defendant is not able to separate its intracity business from its interstate business, nor can it keep records of such business, nor can it continue in any one of the operations without giving up its entire business. In other words, it needs all of its business to keep in operation.

In *Pullman Co.* v. *Adams*, 189 U. S. 420, a Mississippi statute was involved, imposing a privilege tax on each sleeping-car company carrying passengers from one point to another within the State. The proof showed that the defendant company carried passengers into Mississippi from points outside the State, or out of Mississippi from points within the State, but that the same cars also carried passengers from point to point within the State. It was contended that the tax was invalid as a burden upon interstate commerce. The United States Supreme Court affirmed the judgment of the State court, holding the tax valid, saying that the defendant had the right to choose between what points it would carry persons and, therefore, the right to give up the carriage of passengers from one point to another within the State. The court further said, "The company cannot complain of being taxed for the privilege of doing a local business which it is free to renounce." The distinguishing factor in that case and in the situation before us is that the record is clear and uncontroverted that the defendant herein is not free to renounce. The record is uncontradicted that the defendant cannot engage in any one portion of its business without the other.

In *Sprout* v. *South Bend*, 277 U. S. 166, the Supreme Court of the United States, considering an ordinance of the city of South Bend imposing a license on motor busses, stated, "But in order that the fee or tax shall be valid, it

must appear that it is imposed solely on account of the intrastate business; that the amount exacted is not increased because of the interstate business done; that one engaged exclusively in interstate commerce would not be subject to the imposition; and that the person taxed could discontinue the intrastate business without withdrawing also from the interstate business." The evidence in the instant cause makes this language applicable to the case here.

The case is similar in some respects to *People* v. *Horton Motor Lines, Inc.*, 281 N. Y. 196, 22 N. E. 2d 338. That case involved an interstate motor carrier which operated a fleet of trucks within the city of New York to deliver and pick up freight to and from its New York terminal or to other shippers within the city. The question involved was whether the public carter's ordinance could be applied to the defendants' small trucks which engaged primarily in interstate commerce, although all operated "within the city." In determining that the defendant was not subject to the carter's ordinance, the court cited *Notthern Pacific Railway Co.* v. *Washington ex rel. Atkinson*, 222 U. S. 370. In that case it was said, "The train, although moving from one point to another in the State of Washington, was hauling merchandise from points outside of the State destined to points within the State and from points within the State to poinfs in British Columbia, as well as in carrying merchandise which had originated outside the State and was in transit through the State to a foreign destination. This transportation was interstate commerce, and the train was an interstate train."

The language of this last cited case is applicable here. While the defendant may have intracity loads in part upon its trucks, it is clear that every load combines intrastate

and interstate property as well. The incidental carrying of loads within the city does not make the defendant subject to the license tax here. The defendant cannot separate its loads, nor can it discontinue any part of the service. Under these facts, we must conclude that the defendant is engaged in interstate commerce within the meaning of that term and is not subject to the license tax here in question.

Under the view we have taken in this cause, it is not necessary to consider the other arguments made by the appellant and appellee. For the reasons stated herein, the judgment of the municipal court of the city of Chicago is affirmed.

Judgment affirmed.

THOMPSON, C. J. and CRAMPTON, J., dissenting.

APPENDIX "B".

(Text of Order of Supreme Court of the United States, granting certiorari, etc.)

No. 493. October Term, 1950.

City of Chicago, Petitioner, v. The Willett Co., Respondent.

"April 23, 1951. Per Curiam: The petition for writ of certiorari is granted. The judgment is vacated and the case is remanded to the Supreme Court of Illinois for clarification by that court to show, in light of *Minnesota* v. *National Tea Co.*, 309 U. S. 551, 84 L. ed. 920, 60 S. Ct. 676; *State Tax Com.* v. *Van Cott*, 306 U. S. 511, 83 L. ed. 950, 59 S. Ct. 605, whether the judgment herein rests on an adequate and independent state ground or whether decision of a federal question was necessary to the judgment rendered."

[Reported in 341 U. S. 913, 95 L. ed. 1349.]

APPENDIX "C"

(Text of Clarifying Opinion and Decision of Supreme Court of Illinois, pursuant to Mandate of Supreme Court of the United States upon entry of order granting certiorari, etc.)

[Rendered and Filed December 17, 1951.]

Docket No. 31312.

The City of Chicago, Appellant, v. The Willett Company, Appellee.

Mr. Justice Fulton delivered the opinion of the court:

Pursuant to the order entered by the United States Supreme Court in the cause of *City of Chicago* v. *The Willett Co.* (No. 493, October term, 1950, of said court,) requesting a clarification of our opinion in the same cause, reported in 406 Ill. 286, as to whether or not a decision of a Federal question was necessary, the basis for the opinion in said cause is as follows:

Osborne v. *Florida,* 164 U. S. 650, and *Pullman Co.* v. *Adams,* 189 U. S. 420, hold that only when a separation, in fact, of intrastate and interstate business exists a like separation may be recognized between the control of the State and that of the nation to apply a tax such as proposed here. The burden of proving inseparability is on him who asserts that, although actually within, the traffic is legally outside the State; that unless the interstate character is established, locality determines the question of jurisdiction. (*Pennsylvania Railroad Co.* v. *Knight,* 192 U. S. 21.) *Sprout* v. *South Bend,* 277 U. S. 166, holds that in order that the fee or tax be valid it must appear that it is imposed solely on account of the intrastate business; that

the amount exacted does not increase because of the interstate business done; and that the person taxed could discontinue the intrastate business without withdrawing also from the interstate business.

The sole evidence in the cause, to which fact situation the above rules of law had to be applied, was to the effect that the Willett Company is not able to separate intrastate from interstate and inter-city business, nor can it keep records of such business or degrees of business, nor can it continue in any one of its operations without giving up its entire business. The city did not contradict, oppose or challenge this evidence either by introducing evidence in opposition thereto or by cross-examining the witnesses to challenge their veracity.

Our decision is that the Chicago carters ordinance is valid, but, in the light of the rules of the foregoing cases, could not be applied to the Willett Company because of the uncontradicted evidence which removes the Willett Company from an application of the license tax.

The judgment of the municipal court of the city of Chicago is affirmed.

Judgment Affirmed.

APPENDIX "D".

(*Text of Ordinance involved.*)

Be it ordained by the City Council of the City of Chicago:

Section 1. This Ordinance shall be known as Chapter 163 of the Municipal Code of Chicago, and shall be designated as the Carters Ordinance:

Chapter 163

Carters

163-1. Every express wagon, cart, truck, dray, wagon, automobile, autocar, auto truck, or other vehicle of any kind, either drawn by animal or self-propelled, which shall be operated, driven or employed for the purpose of transporting or conveying bundles, parcels, furniture, trunks, baggage, goods, wares, merchandise, produce, or other articles within the city for hire or reward, shall be deemed a cart within the meaning of this chapter, whether such vehicle is employed or hired from any public stand, public way, barn, garage, office, or other place in the city by the day, week, month or year.

Any person engaged in the business of operating a cart shall be deemed a carter.

163-2. An annual license tax is imposed upon every carter for each cart operated or controlled by him, according to the following schedule:

Horsedrawn vehicle—	
One-horse	$ 2.75
Two-horse	5.50
Three-horse	6.25
Four-horse	11.00
Six-horse	13.75
Automotive vehicles—	
Capacity not exceeding two tons	$ 8.25
Capacity exceeding two but not exceeding three tons	11.00
Capacity exceeding three but not exceeding four tons	13.00
Capacity exceeding four tons	16.50

No license shall issue except upon payment of the full annual license tax.

It shall be unlawful for any person to engage in the business of a carter without first having paid such license tax.

163-3. An application shall be made in conformity with the general requirements of this code relating to applications for licenses and such application shall include a statement of the number of vehicles with such details of description and on such forms as may be required by the City Collector.

The City Clerk shall deliver to each carter, upon payment of the license tax herein imposed, a license emblem which shall bear the words "carter" and the numerals designating the year for which such license tax has been paid. It shall be the duty of the carter to affix the license emblem in a conspicuous place on the vehicle. It shall be unlawful for any person to drive a cart which does not bear such license emblem.

163-4. Any person violating any of the provisions of this chapter shall be fined not less than fifty dollars nor more than two hundred dollars for each offense and each day such violation shall continue shall be regarded as a separate offense.

Section 2. Chapter 163, entitled "Public Carters" as it has heretofore appeared in the Municipal Code of Chicago is hereby repealed.

Section 3. Chapter 132, entitled "Furniture Movers" of the Municipal Code of Chicago, is hereby repealed.

Section 4. This Ordinance shall be in force and effect upon passage and due publication.

(*Journal of the Proceedings of the City Council of the City of Chicago, Illinois, for January 14, 1949, page 3679.*)

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1953

No. ~~644~~ 23

CITY OF CHICAGO, a Municipal Corporation,
Petitioner,

vs.

THE WILLETT COMPANY, an Illinois Corporation,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Illinois.

BRIEF FOR RESPONDENT IN OPPOSITION.

RICHARD J. DALEY,
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Table of Cases Cited.

STATUTES.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1951.

No. 644

CITY OF CHICAGO, a Municipal Corporation,
Petitioner,

vs.

THE WILLETT COMPANY, an Illinois Corporation,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Illinois.

BRIEF FOR RESPONDENT IN OPPOSITION.

The respondent, The Willett Company, an Illinois corporation, presents this statement in opposition to the Petition for Writ of Certiorari to the Supreme Court of Illinois and respectfully submits the following:—

OPINION OF THE SUPREME COURT OF ILLINOIS.

The original opinion of the Supreme Court of Illinois may be found in the transcript of record (R. 23-29) and is officially reported in 406 Ill. 286, 94 N. E. (2d) 195. The clarification opinion rendered by the Supreme Court of Illinois pursuant to mandate of this Court is set forth in the record. (R. 39-40)

JURISDICTIONAL STATEMENT.

The petitioner relies upon subdivision 3 of section 1257 of Title 28 Judiciary and Judicial Procedure to give juris-

diction to the Supreme Court of the United States to review the judgment of the Supreme Court of Illinois.

QUESTIONS PRESENTED.

The questions here presented are

1. Whether the decision of the Supreme Court of Illinois affirming the judgment of the Municipal Court of Chicago finding the respondent "not guilty" of a violation of the Carter's Ordinance on the evidence presented, involving any title, right, privilege or immunity especially set up or claimed under the Commerce Clause of the Federal Constitution.

2. Whether the discussion by the Supreme Court of Illinois concerning the constitutional question is necessary to their decision that "* * * it was not the legislative intent in the enactment of this statute to impinge upon interstate commerce, or to interfere with it in any way whatsoever," (R. 25)

3. Whether the decision of the Supreme Court of Illinois holding "that it was not the intent of the legislative authority of the city of Chicago to include by the use of the phrase 'within the city' the operations of the respondent corporation" (R. 26) involves a federal question so as to subject the decision to a review by this court under subsection 3 of section 1257 of Title 28, Judiciary and Judicial Procedure.

4. Whether the decision of the Supreme Court of Illinois that the Ordinance created a burden on interstate commerce is supported by the evidence or inferences that can be reasonably drawn from the evidence.

5. Whether the purported decision of the Supreme Court of Illinois on the alleged federal question is contrary to the decisions of this Court on that question.

ARGUMENT.

Objections to Jurisdiction.

I.

The Supreme Court of Illinois did not decide a Federal question.

In the inception it is pointed out (1) that the decision of the Supreme Court of Illinois does not draw into question the validity of any treaty or statute of the United States; (2) that the decision of the Supreme Court of Illinois does not hold the Carter's Ordinance of the City of Chicago repugnant to the Constitution, Treaties or Laws of the United States; (3) nor does it decide any question of Title, Right, Privilege or Immunity claimed under the Constitution, Treaties, or Statutes of the United States; U.S.C.A., Title 28, 1257-3.

The Supreme Court of Illinois in the case at bar merely construed an Ordinance of the City of Chicago and held that the words "within the city" limited the operation of the Ordinance to transportation wholly within the corporate limits of the City of Chicago and was not applicable to the particular business of the respondent which consisted not only of business done within the corporate limits of the City of Chicago but extended to intrastate and interstate business.

The opinion of the Supreme Court specifically held that the ordinance in question "is not invalid by its terms." (R. 25) The Supreme Court found that it was not the intent of the Council of the City of Chicago to impose an occupational tax upon the operations of the respondent

or others similarly situated. Succinctly stated, the Court merely construed the ordinance and found that it was not the legislative intent to levy an occupational tax upon 'carters', whose operations were not confined to the corporate limits of the City of Chicago, and who were engaged in intra and interstate commerce.

The petitioner on page 6 of their petition states that the Supplemental Clarifying Opinion of the Illinois Supreme Court expressly declares that the basis for the present judgment is the court's conclusion that the Commerce Clause of the Federal Constitution prevents a municipal tax * * * from being applied to the respondent's purely local cartage operation because they are inseparably linked with respondent's interstate business. A careful reading of the Clarifying Opinion does not support this assertion. The Court specifically said:

> "Our decision is that the Chicago Carter's Ordinance is valid, but, in the light of the rule of the foregoing cases could not be applied to the Willett Company because of the uncontradicted evidence which removes the Willett Company from the application of the license tax. (R. 40)"

This statement of the Supreme Court of Illinois is entirely consistent with their original decision *that it was not the intent of the city council to include the business of Carter's doing business outside of the corporate limits of the City of Chicago.* (R. 32)

The Supreme Court of Illinois in defining the issues states that the question here is one of application of the Ordinance to the particular aspects of the hauling done by the defendant. (R. 33.) The petitioner on page 12 of their petition admits that "the Supreme Court of Illinoi construed the ordinance as confined to local transporta-

tion and that it is not intended to tax interstate business. (Pet. 12, R. 25) but maintained that the decision does not "dissipate the error of that Court's ruling on a substantial federal question * * *." (Pet. 12)

On page 13 of their petition the petitioner states

> "The ordinance is actually limited in its coverage to purely local business and casts no burden whatever upon interstate commerce because it neither purports to nor does it in fact levy any tax upon respondent's operations. The indivisibility of respondent's interstate and intrastate business constitutes no grounds for invoking the Commerce Clause as a bar to a fair and reasonable tax levied in respect to respondent's purely local business."

The fallacy of this argument is clearly demonstrated when we consider the fact that every truck used by the respondent carried both local, intrastate and interstate shipments. The tax is levied upon an instrumentality used in interstate commerce. This is especially true because both the Municipal Court of Chicago and Supreme Court of Illinois found as a fact that it is impossible for the respondent to separate one from the other or to give up its intra-city business and continue its inter-state business.

The petitioner under its Summary at page 2 sets forth that the decision of the Supreme Court of Illinois which held the ordinance of the City of Chicago unenforceable as against the respondent corporation was predicated "on the sole ground that it was obnoxious to the commerce clause of the Federal Constitution", while on page 4 of the petition it asserts;—

> "Although the Supreme Court of Illinois construed the ordinance, and the tax prescribed thereby, as limited to purely intracity transportation (R. 25), it nevertheless held the ordinance unenforceable as

an impermissible interference with the Federal commerce powers * * *." (R. 29)

Again on page 12 it is set forth that:

> "The Supreme Court of Illinois construed the ordinance as confined to local transportation and as not intending to tax interstate business." (R. 25)

The Supreme Court of Illinois in passing on this question said:—

> "We, therefore concur in the view of the court below that it was not the legislative intention, in the enactment of this statute, to impinge upon interstate commerce, or to interfere with it in any way whatever; * * *." (R. 25)

This case was decided on purely non-federal ground independently sufficient to support the judgment. (*Wood* v. *Chesborough*, 228 U. S. 672, 676-80; *West Chicago St. R. Co.* v. *Illinois ex rel. Chicago*, 201 U. S. 506, 519-20; *Chicago B & Q R. Co.* v. *Illinois ex rel. Commissioners*, 200 U. S. 561, 581; *Lynch* v. *New York ex rel. Pierson*, 293 U. S. 52, 54-5; *Adams* v. *Russell*, 229 U. S. 353, 358; *Woods* v. *Nierstheimer*, 328 U. S. 211; *Phyle* v. *Duffy*, 334 U. S. 431; *Williams* v. *Kaiser*, 323 U. S. 471, 477.)

No Federal question was adjudicated by the Supreme Court of Illinois and its decision was predicated upon the adequate and independent non-federal ground that it was not the intent of the Council of the City of Chicago to levy an occupational tax upon "carters" engaged in intrastate outside the territorial limits of Chicago. It merely construed the phrase "within the City of Chicago" as used in the Carter's Ordinance to exclude all transportation where the point of origin and the point of destination were not both within the corporate limits of the City of Chicago.

The ordinance of the City of Chicago was an attempt by the City of Chicago under its delegated legislative authority to tax "every express wagon, cart, truck, automobile, car truck, etc. * * * employed for the purpose of transporting or conveying bundles, parcels, etc. * * * within the city of Chicago for hire or reward." (R. 5)

The respondent argued both in the Municipal Court of Chicago and in the Supreme Court of Illinois that the phrase "within the city" did not limit the operation of the ordinance to operations where both the point of origin and the point of destination are in the city and for this reason include shipments which were but a part of interstate commerce and that the ordinance when so construed constituted an interference with and a burden upon interstate commerce in violation of the Federal Constitution. (R. 19)

The City of Chicago in opposition to this contention maintained that the ordinance in question neither purported nor attempted to tax cartage operations beyond the corporate limits of the City of Chicago and sought to have the words "within the city" so construed and interpreted. (R. 17)

The City's Brief filed in the State Supreme Court set forth this contention as follows:—

> "We wish to make it clear that by intracity business we do not mean to indicate even a trip from a point within the city which is but a segment of an intercity or interstate journey but only such trips as begin and end within the city and do not form a part of a longer journey traversing City or State lines."

The Supreme Court of Illinois rejected the argument of the respondent "Cartage Company" and adopted the in-

terpretation of the words "within the city" suggested by the petitioner. (R. 24.) The question of whether or not it was the intent of the City of Chicago in passing the ordinance in question to include the intrastate and interstate business of the defendant corporation is clearly a non-federal question. The State Court stated that the question is one of application of the ordinance to the practical aspects of the hauling done by the defendant. (R. 25) In adopting this construction of the words "within the city" the Supreme Court of Illinois followed the case of *Pacific Express Co.* v. *Seibert,* 142 U. S. 339, and held that the phrase "within the city" as used in the ordinance meant purely intra-city commerce.

A Writ of Certiorari must be dismissed, where the state court's decision rests on non federal ground, notwithstanding unnecessary discussion of constitutional question. *Geo. O. Richardson Machinery Co.* v. *Scott,* Okl. 1928, 48 S. Ct. 264; 276 U. S. 128, 72 L. Ed. 497; *McCoy* v. *Shaw,* Okl. 1928, 48 S. Ct. 519, 277 U. S. 302, 72 L. Ed. 891.

The Federal Supreme Court will not review a state court decision resting on an adequate and independent non federal ground, through the decision also rests upon an erroneous view of federal law. *Radio Station WOW* v. *Johnson,* Neb. 1945, 65 S. Ct. 1475, 326 U. S. 120, 89 L. Ed. 2092.

Where a decision of state court might have been either upon a state ground or a federal ground and the state ground is sufficient to sustain the judgment, the United States Supreme Court will not undertake to review it. *Williams* v. *Kaiser,* Mo. 1945, 65 S. Ct. 363, 323 U. S. 471, 89 L. Ed. 398; *Fox Film Corporation* v. *Muller,* Minn. 1935, 56 S. Ct. 183, 296 U. S. 207, 80 L. Ed. 158; *Lynch* v. *People of New York ex rel. Pierson,* 1934, 55 S. Ct. 16, 293

U. S. 52, 79 L. Ed. 191; *Klinger* v. *Missouri*, Mo. 1871, 13 Wall. 257, 20 L. Ed. 635.

The construction placed on a state law or ordinance is conclusive on United States Supreme Court. *International Union, U.A.W., A. F. of L., Local 232* v. *Wisconsin Employment Relations Bd.*, Wis. 1949, 69 S. Ct. 516, 336 U. S. 245; *Oklahoma Tax. Commission* v. *Texas Co.*, Okl. 1949, 69 S. Ct. 561, 336 U. S. 342.

What the statutes of a state means, the extent to which it may be limited are questions on which the highest court of a state has the final word. *Musser* v. *State of Utah*, 1948, 68 S. Ct. 397, 333 U. S. 95, 92 L. Ed. 562; *Senn* v. *Tile Layers Protective Union, Local No. 5*, Wis. 1937, 57 S. Ct. 857, 301 U. S. 468, 81 L. Ed. 1229. See also *Atchison, T. & S. F. Ry. Co. Co.* v. *Railroad Commission of State of California*, 1931, 51 S. Ct. 553, 283 U. S. 380, 75 L. Ed. 1128.

A federal question does not arise where the claim is made that a state statute is inconsistent with the power of Congress to regulate commerce among the states, and the highest court of the state holds that the statute was intended to apply and applied only to domestic transportation. *Erie R. Co.* v. *Purdy*, N.Y. 1902, 22 S. Ct. 605, 185 U. S. 148, 46 L. Ed. 847.

The Supreme Court of Illinois in its Opinion outlined the nature of the business conducted by the respondent and in so doing stated:

> "It appears, insofar as can be ascertained from this record, that the defendant herein operated its trucks under contract with large industries, and, in the main, with other interstate carriers bringing property into the City of Chicago the defendant itself does not determine what articles it should carry on

its trucks but carries articles of all kinds, in interstate, intrastate and intracity traffic It has no basis for a differentiation between the shipments which it carried on its trucks but carries what is given it by the contractor, retailer or carrier with whom it is dealing, and on every load the three types of trucks are so intermingled as to be impossible of separation, *it is apparent from these statements that the type of business done by the defendant herein is not one generally considered to be within the meaning of a Carter's Ordinance.*" (R. 26, 27) (Italics ours)

II.

The Decision Is Not In Conflict With Federal Law.

The Supreme Court in construing the ordinance held that it was not repugnant to the Constitution and held the ordinance to be valid. The discussion in the State Supreme Court's opinion regarding the question of interstate commerce is mere *dictum.* However, the general principles expressed by the Court in regard to the Federal Interstate Commerce Clause of the Constitution and its application to the case at bar is in complete accord with the decisions of this Court.

In order to properly present the issues raised in this Court it is necessary to outline the nature of the respondent's business as shown in the record. The respondent owned a number of trucks which they leased to various concerns in the City of Chicago. The trucks were leased by the day, week, month or year or on a mileage basis. The respondent furnished a driver with each truck who was loaned to a lessee. The lessee placed various parcels, packages, etc. in the truck and they were carried (1) from places within and outside the city to places within the city (2) to points outside the city but within

the state and (3) to points outside of the State. The respondent exercised no control over the vehicles or the destination or the nature of the freight carried. (R. 12)

The contract of the respondent with the Pennsylvania Railroad Co. is a fair example of the nature of the defendant's business. The defendant company leased to the Pennsylvania Railroad Co. certain of its trucks and supplied the Railroad Company with drivers. The Pennsylvania Railroad Co. used these trucks to pick up packages and freight which were delivered to the Pennsylvania Railroad Company station in Chicago from points both within and outside of the city. These parcels were then transported by the railroad to points outside of the City of Chicago either within the state or to points beyond the state line. The trucks were also used by the Pennsylvania Railroad Company to transport freight and parcels coming into the railway station from points outside the city to points within the City. As far as cartage in the respondent's trucks was concerned the entire carriage was from a point within the City of Chicago to a point within the City of Chicago but this carriage was largely an integral part of interstate transportation. The origin of this freight may have been New York and its destination may have been Los Angeles. Similarly the freight transported in these trucks may have had its origin in New York State and its destination may have been Los Angeles or its origin may have been in the City of Chicago and its destination New York. In this case the transportation would be entirely within the city limits as far as the trucks are concerned yet the carriage would be but a segment of interstate copmerce. Under the ordinance the vehicle would be subject to the tax. If the Supreme Court of Illinois had held that the phrase

"within the City of Chicago" as used in the ordinance included this type of transportation the Federal question of whether or not the ordinance was repugnant to the Federal Constitution would have been an issue.

In the case of the *Northern Pacific Ry. Co.* v. *Washington* (222 U. S. 370, 375), the train in question although operating from one point to another in the State of Washington, was also hauling merchandise from points outside of the State, destined to points within the State, and from points within the State to British Columbia as well as carrying merchandise which had originated outside of the State and was in transit through the State to a foreign destination. The Court held this to be interstate commerce and the train an interstate train, despite the fact that it also carried local freight between points in the State of Washington and in view of the unity and indivisibility of the service and the paramount character of the authority of Congress to regulate commerce, the Act of Congress was exclusively controlling.

This is the same situation that exists in the case at bar. Under the contract of the defendant with the Pennsylvania Railroad Co., the defendant carries freight in interstate commerce as well as freight in intrastate and local commerce. The tax in question is directed against the vehicle carrying these packages. This vehicle in the case at bar is an integral instrumentality of interstate commerce. This ordinance is an attempt to tax the instrumentality.

In the cases of *Osborne* v. *Florida*, 164 U. S. 650 and *Pullman Company* v. *Adams*, 189 U. S. 420, this Court held similar enactments valid only because it affirmatively appeared that the intrastate and interstate business of the defendant was separable. In the case at bar the evi-

dence clearly shows and both the Municipal Court of Chicago and the Supreme Court of Illinois held, in a finding of fact, that it was "impossible to separate the intracity, intrastate and interstate business of the respondent."

The case of *Sprout* v. *South Bend* (277 U. S. 166) is a case involving an ordinance of the City of South Bend, Indiana prohibiting with certain exceptions the operation on its streets of any motor bus for hire unless licensed by the City. The carrier claimed that the ordinance violated the Commerce Clause and the Equal Protection Clause of the Fourth Amendment. Sprout carried passengers both in intrastate and interstate commerce. The license fee imposed was not an incident to any scheme of municipal reglations but as in the case at bar was for revenue only. In this case, the court held:

> "It follows that on the record before us the exaction of the license fee cannot be sustained either as an inspection fee or as an excise for the use of the streets of the city. It remains to consider whether it can be sustained as an occupation tax. A State may, by appropriate legislation, require payment of an occupation tax from one engaged in both intrastate and interstate commerce.
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> * * * * * * *
>
> And it may delegate a part of that power to a municipality.
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> * * * * * * *
>
> But in order that the fee or tax shall be valid, it must appear that it is imposed solely on account of the intrastate business; that the amount exacted is not increated because of the interstate business done; that one engaged exclusively in interstate commerce would not be subject to the imposition; and that the person taxed could discontinue the intrastate business without withdrawing also from the interstate

business. *Leloup* v. *Port of Mobile*, 127 U. S. 640; *Crutcher* v. *Kentucky*, 141 U. S. 47, 58; *Adams Express Co.* v. *New York*, 232 U. S. 14, 30; *Bowman* v. *Continental Oil Co.*, 256 U. S. 642, 647. Compare *Williams* v. *Talladega*, 226 U. S. 404, 417; *Postal Telegraph Cable Co.* v. *Richmond*, 249 U. S. 252. The Supreme Court of Indiana, far from construing the ordinance as applicable solely to busses engaged in intrastate commerce, assumed that it applied to busses engaged exclusively in interstate commerce and that Sprout was so engaged. The privilege of engaging in such commerce is one which a State cannot deny. *Buck* v. *Kuykendall*, 267 U. S. 307; *Bush & Sons Co.* v. *Maloy*, 267 U. S. 317. A State is equally inhibited from conditioning its exercise on the payment of an occupation tax."

In the case at bar the Ordinance levies a license fee upon "carts" in accordance with their hauling capacity. The tax is the same for "carts" delivering one or two packages a day "within the City of Chicago," and for carts employed entirely in local transportation. It does not distinguish between freight that is transported from point to point in the city where the carriage of such freight is a part of its passage in interstate commerce.

In the *Sprout* case at page 167 the Court said:

> "The ordinance makes no distinction between busses engaged exclusively in interstate commerce from those engaged exclusively in intrastate commerce, and those engaged in both classes of commerce."

In *Cooney, Governor of Montana* v. *The Mountain States Telephone and Telegraph Company*, 294 U. S. 384, the State of Montana taxed each telephone used by the defendant. The telephones were used in intrastate and interstate commerce. The company could not discontinue its intrastate business without destroying its interstate business. In passing upon this case the Court said at page 392:

"A State cannot tax interstate commerce; it cannot lay a tax upon the business which constitutes such commerce or the privilege of engaging in it. And the fact that a portion of the business is intrastate and therefore taxable does not justify a tax either upon the interstate business or upon the whole business without discrimination. *Leloup* v. *Mobile*, 127 U. S. 640. There are 'sufficient modes' in which the local business may be taxed without the imposition of a tax which covers the entire operations." *id.* p. 647; See *Williams* v. *Talladega*, 226 U. S. 404, 419. Where the tax is exacted from doing both an interstate and intrastate business, it must appear that it is imposed solely on account of the latter; that the amount exacted is not increased because of the interstate business done; that one engaged exclusively in interstate commerce would not be subject to the tax; *and that the one who is taxed could discontinue the intrastate business without also withdrawing from the interstate business.* *Sprout* v. *South Bend*, 277 U. S. 163, 171; *East Ohio Gas Co.* v. *Tax Commission*, 283 U. S. 465, 470.

"*A privilege or occupation tax which a state imposes with respect to both interstate and intrastate business, through an indiscriminate application to instrumentalities common to both sorts of commerce, has frequently been held to be invalid.* *Leloup* v. *Mobile, supra; Pickard* v. *Pullman Southern Car Co.*, 117 U. S. 34, 46; *Crutcher* v. *Kentucky*, 141 U. S. 47, 59; *Adams Express Co.* v. *New York*, 232 U. S. 14, 29, 31; *United States Express Co.* v. *New York*, 232 U. S. 35, 36; *Bowman* v. *Continental Oil Co.*, 256 U. S. 647, 648. *In the case of the express companies, the principle was applied to a privilege tax imposed alike with respect to wagons used in the movement of both interstate and intrastate shipments. The local shipments 'were handled in the same vehicles, and by the same men' that were employed in connection with the interstate transportation and it was*

impracticable to effect a separation. Adams Express Co. v. New York, supra; United States Express Co. v. New York, supra. In *Bowman v. Continental Oil Co. (supra) the question arose under a statute of New Mexico, laying an annual license tax of fifty dollars for each station distributing gasoline.*" (Italics ours)

Again the attention of this Court is called to the finding of the Supreme Court of Illinois that the interstate, intrastate and intracity business of the respondent was inseparable and that the respondent could not discontinue one and remain in business.

The petitioner relies upon the case of *Pacific Telephone & Telegraph Co. v. Washington Tax Commission,* 297 U. S. 403, 80 L. Ed. 760 but fails to point out that in that case although the Pacific Telephone and Telegraph Company was engaged in both inter and intrastate commerce, the tax was levied solely upon the gross income from intrastate commerce. It was not a tax levied upon an instrumentality used in both local and interstate commerce, as in the case at bar, but a tax levied solely on the gross income from intrastate commerce.

A tax on an instrumentality used in interstate commerce is a burden on interstate commerce and such a tax cannot be sustained unless it appears affirmatively in some way that the tax is levied only as compensation for the use of the highway or to defray the expenses of regulating motor traffic. Unless it is shown that the nature of the imposition is such as is directly proportionate to the use of the roads or services rendered by the city or if it bears no reasonable relation to the privilege of using the highway, it cannot be given presumptive validity. *Interstate Busses Corporation v. Blodgett,* 276 U. S. 245; *Sprout v. South Bend,* 277 U. S. 170.

The petitioner maintains that the record is wholly lacking in proof upon the vital issue of undue burden on interstate commerce.

The record in this case shows and the Supreme Court of Illinois found, as a fact, that the respondent was engaged in intrastate, interstate and local freight in the City of Chicago and that the company operated from Chicago to surrounding States and in that manner was engaged in interstate commerce. The undisputed evidence further showed that the respondent did not keep records of the shipments it made within the City of Chicago or what shipments were interstate, intracity or intrastate in their character because the respondent had no control over the commodities carried. Its trucks were under contracts with large industries and in the main with other interstate carriers bringing property into the City of Chicago. These companies exclusively controlled the operation. The defendant itself did not determine what articles were carried in the trucks but carried articles of all kinds in the sole discretion of the contractors, retailers or carriers with whom it was dealing and the respondent further showed that it did not keep records of the shipments because it did not handle the shipments as such and did not go from house to house picking up shipments for delivery within the city but its entire business was concerned with hauling under contracts for various firms, enterprises and other carriers in the City of Chicago. The undisputed evidence further showed that because of this arrangement there was no possible way in which they could determine the proportion of local transportation as compared with intrastate or interstate traffic but that in all its operations every truck had some type of all freight on it during the course of a year.

Upon this undisputed evidence both the Municipal Court of Chicago and the Supreme Court of Illinois held that the defendant was not able to separate its intrastate business from its interstate business and that it could not continue to operate in any one of the operations without giving up its entire business and that in order to operate it needed all of its business to keep in operation. It necessarily follows that if the respondent in any truck carried any intracity freight at any time within the taxable year, that truck was subject to the levy of the ordinance. It is apparent that the tax is levied without respect to the quantity or volume of intracity traffic.

III.

The ordinance constitutes an undue burden upon interstate commerce.

The evidence in this case clearly shows that the defendant was engaged in interstate, intrastate and local commerce and that it was not possible to separate the local and the intracity freight from the interstate freight and that the respondent did not have control of the loading or destination of the trucks so that it could differentiate between the various type of shipments carried on the truck. The Petitioner admits that the shipments were inseparable but argues that this fact is insufficient to show the ordinance constituted an undue burden upon interstate commerce.

In the case of *Cooney, Governor of Montana* v. *The Mountain States Telephone and Telegraph Company*, 294 U. S. 384, where a tax was levied upon telephone used both in intra and interstate business the Court held the tax, being indiscriminate in its application, *necessarily burdened interstate commerce.*

It is obvious that the tax proposed by the ordinance unless the construction of the State court is accepted is a tax upon trucks that carry both intrastate and interstate freight. A tax upon an instrumentality of interstate commerce, even though small in amount, is necessarily a burden upon interstate commerce because it increases the cost of operating in interstate commerce while a tax upon the gross local business is not a burden *per se* and proof is required to establish it.

It is an established rule of law in this State that the Supreme Court will not reverse a trial court upon a question of fact unless there is a total lack of evidence or inferences that may be drawn from the evidence tending to support the finding of the trial court. Certainly the evidence is sufficient to establish that the tax upon these instruments used in interstate commerce constitute a burden upon interstate commerce.

IV.

There are no important questions of law or policy involved.

It is respectfully submitted that this case presents no important questions of Federal Law and that it is not in conflict with the decision of this Court or with those of any other Federal Court of Appellate jurisdiction. There is no showing that this decision is applicable to any other firm or corporation operating elsewhere in the State of Illinois or that it will have an important or far reaching application. The State Court merely construed the ordinance in question and held it valid and that the ordinance as construed was not repugnant to the Commerce Clause of the Federal Constitution but that it was inapplicable to the operations of this particular respondent.

CONCLUSION.

For the foregoing reasons it is respectfully submitted that this Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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GEORGE J. SCHALLER,
CHARLES DANA SNEWIND,
Attorneys for Respondent.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1952.

No. 23

CITY OF CHICAGO, a Municipal Corporation,
Petitioner,

vs.

THE WILLETT COMPANY, an Illinois Corporation,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

BRIEF AND ARGUMENT FOR RESPONDENT.

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To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

OPINION OF THE SUPREME COURT OF ILLINOIS.

The opinion of the Supreme Court of Illinois is included in the printed transcript of the record (Tr. 21) and is officially reported in 406 Ill. 286. The clarification opinion of the Supreme Court of Illinois is likewise included in the printed transcript of the Record (Tr. 39) and it is officially reported in 409 Ill. 480.

JURISDICTIONAL STATEMENT.

The petitioner relies upon subdivision 3 of Section 1257 of Title 28 Judiciary and Judicial procedure to give jurisdiction to the Supreme Court of the United States to review the judgment of the Supreme Court of Illinois.

STATEMENT OF THE CASE.

This case arose in the Municipal Court of Chicago upon the filing by the City of Chicago of a quasi criminal complaint against the respondent, The Willett Company, to recover a penalty for an alleged violation of an ordinance commonly called the "Carter's Ordinance" of the City of Chicago. The Complaint alleged that the respondent was engaging in the occupation of transporting freight by motor vehicle "within the city" without having first obtained a license in violation of Chapter 163 Municipal Court of Chicago (Tr. 1). The cause was heard by the Court without a jury (Tr. 2).

The ordinance in question provided in substance "that every express wagon, cart, truck, etc. * * * which shall be operated, driven or employed for the purpose of transporting or conveying bundles, etc. * * * *within the city for hire or award shall be deemed a cart* * * * whether such vehicle is employed or hired from any public stand, public way, barn, garage, office, etc. in the City of Chicago by the day, week, month or year," and that any person operating a cart shall be deemed a carter. The ordinance imposed upon each cart operated or controlled by a carter, an annual license fee ranging from $2.75 for a one horse drawn vehicle to $16.50 per annum for automotive vehicles of a capacity of four tons or more and further provided for a penalty for the violation of the said ordinance (Tr. 5, 6).

It is admitted by the petitioner that the tax in question is not intended to be a personal property tax upon the property of the respondent, a tax for the use of the roads nor a regulatory tax but is an occupational or privilege tax levied upon instrumentalities used by the respondent in interstate, intrastate and intracity business.

On the trial it was stipulated that the Willett Company advertised and held itself out to serve the public, connecting carriers and forwarding companies generally (a) by leasing trucks with drivers to shippers by the hour, day, week, year or any period; (b) by making contracts with shippers to perform all trucking for a fixed period; (c) by giving occasional service or handling single shipments in local cartage for any shipper at rates per hundred pounds, per ton, per piece or other unit; (d) by distributing pooling cars and (e) by rendering collection and delivery service, station or sub-station service for rail, water and highway motor carriers and forwarding companies either under contract or on some other basis (Tr. 7).

It was further stipulated that the Willett Company, in the course of its day's business, would transport property for hire, as set out above, under the following conditions:

"1. From points within the City of Chicago to other points within the City of Chicago; (2) From points within the City of Chicago to other points in the State of Illinois outside the City of Chicago; (3) from points in the State of Illinois outside the City of Chicago to points within the City of Chicago; (4) from points in the City of Chicago to points in Indiana; (5) from points in Indiana to points in the City of Chicago; (6) from points in Illinois, outside of the City of Chicago, to points in Indiana; (7) from points in Indiana to points in Illinois, outside of the City of Chicago; (8) from points in City of Chicago to points in Wisconsin; (9) from points in Wisconsin to points in the City of Chicago; (10) from points in Illinois, outside of the City of Chicago to points in Wisconsin; (11) from points in Wisconsin to points in Illinois, outside of the City of Chicago" (Tr. 8).

It was further stipulated that the Willett Company does not solicit any business from any public stand or street of the City of Chicago and that the said respondent has secured a city vehicle license for all vehicles operated by them in the City; has complied with all of city ordinances necessary to be complied with to lawfully conduct its cartage business within the city except the so-called "Carter's Ordinance"; holds authority from the Interstate Commerce Commission to operate as a common carrier engaged in Interstate Commerce; has filed with the Interstate Commerce Commission a schedule which was in force and effect at the time of the alleged violation and that the respondent had also complied with all provisions of the Federal Motor Carrier Act and the regulations of the Interstate Commerce Commission regarding the operation of his vehicles; has complied with all of the provisions of the Illinois Motor Truck Act and pursuant to the provisions of that act had been granted authority to operate as a specialied, contract and local motor carrier of property in the State of Illinois (Tr. 8).

It was further stipulated that the operations of the Willett Company are so diversified that one of its trucks may, at various times during any day, haul to or from interstate contract carriers, common carriers and car-loading companies, parcel and freight in both intracity, intrastate and interstate commerce and during every single day of the year, carries along with property which never leaves the State, property destined to and from points outside of the State of Illinois (Tr. 9).

An executive vice president of the respondent testified that the company is engaged in the general trucking business and that the operation includes hauling of interstate, intrastate and local freight in the City of Chicago and that it was impossible for the respondent to separate its

intracity and intrastate freight from its interstate freight or to separate the types of freight from their vehicles and that the respondent could not withdraw from its local city business and continue either its interstate or intrastate business and that the intrastate and local city business was not divisible (Tr. 11, 12).

This witness further testified that the respondent had contracts with certain concerns in Chicago to do all of their hauling; that some of the larger contracts were with the Pennsylvania Railroad Company, Acme's Fast Freight; The Air Cargo, which services the airlines, United States Steel Company, Youngstown Steel Company, H. J. Hines Company Standard Brands, the Glidden Company, the Nubian Paint Company, Durkee Famous Foods, and other companies with plants or offices located within the City of Chicago but doing an interstate business (Tr. 12).

In its contract with the Glidden Company which is typical of other contracts, they furnished the company with about a dozen trucks and drivers. The trucks were delivered to the Glidden Company where they were loaded with articles, some of which are transported to points in the city while others are delivered to points outside of the State. He testified because of the arrangement with the companies they had no control of loadings and had no means of knowing how much of the trucking service is local, interstate or intrastate and that no records were kept to determine the proportions between local, intrastate and interstate business (Tr. 11-14).

The witness also described the respondent's contract with the Pennsylvania Railroad Company whereby they would pick up freight from the railroad to be delivered to points within the City of Chicago and also under the contract with the Pennsylvania Railroad Company they would pick up freight in and about the City of Chicago

to be delivered to the Pennsylvania Railroad Company which was to be delivered by the rail carrier to places outside of the City of Chicago and outside of the State of Illinois. (Tr. 12, 13) This evidence stands unrebutted in the record. (Tr. 8-13)

The trial court without filing an opinion found the defendant "not guilty" (Tr. 2) entered a final judgment on its findings and certified that the judgment involved the question of the validity of the City Ordinance. (Tr. 2, 3)

A direct appeal was taken to the Supreme Court of Illinois. In the Supreme Court of Illinois the respondent contended that the phrase "within the City" as used did not limit the application of the ordinance to transportation of freight where both the point of origin and point of destination were within the corporate limits of the City of Chicago but that the phrase included all transportation where any part of the journey was within the city and thus levied a tax upon any vehicle operating within the city limits even if the journey was only a segment of interstate commerce, and thus constituted an interference with and a burden on interstate commerce in violation of the Federal Constitution.

The respondent there argued that trucks, for example, loaded with merchandise at the Glidden plant to be delivered to points in Indiana or Wisconsin would be subject to the tax levied by the ordinance because respondent's vehicle as a part of its interstate journey, operated "within the City". Similarly it was pointed out that freight coming into the Pennsylvania Railroad Station from points outside of the State and taken by the respondent at the station and delivered to other carriers in the City of Chicago from thence to be transported to points outside of the State would be subject to the tax because its journey in respondent's vehicles was entirely within the city although the particular

journey within the city was but a segment of its entire journey in interstate commerce. (Tr. 18-20)

It was also argued by the respondent that the undisputed evidence in this case showed that the local and interstate operations of the respondent could not be separated and that the respondent could not give up his intracity business and continue in interstate commerce, and that because the tax was levied upon an instrumentality used in both types of its operation the tax was necessarily a burden upon interstate commerce and invalid.

The respondent in the Supreme Court of Illinois also raised other questions not involving or in any way connected with interstate commerce, namely, (1) that the Carter's Ordinance violated the Constitution of the State of Illinois; (2) that it was not uniform as to the class upon which it operated; (3) was beyond the power granted to the City by the City and Villages Act of the State of Illinois; (4) the respondent was not a "carter" within the meaning of the ordinance; (5) the Illinois Truck Act repealed the right of the city to tax, license or regulate the business of a carter and that (6) because respondent was already paying an *ad valorem* tax upon its trucks as well as a municipal and state tax on th same vehicles for use of the roads and many other types of taxes and as the Occupational Tax was but a subterfuge to tax the same property over and over again it was therefore both oppressive and unreasonable and constituted a double tax contrary to the State Constitution.

In the Supreme Court of Illinois the petitioner contended that the phrase "within the city" limited the operation of the ordinance to transportation where both the point of origin and the point of destination were within the city and that it was the intent of the ordinance to include nothing other than local transportation, and that the evidence of inseparability of intrastate and intracity

business was insufficient to establish inseparability and that there was a total failure on the part of the respondent to prove that the tax levied by the ordinance constituted an undue burden upon interstate commerce. (Tr. 15-18, 20)

The Supreme Court of Illinois in affirming the judgment of the Municipal Court of Chicago sustained the petitioner's contention and held specifically that the term "within the city" limited the operation of the ordinance to transportation within the corporate limits of the City of Chicago, and based upon this construction held the ordinance valid but not applicable to the particular business of the respondent. (Tr. 22-29)

QUESTIONS PRESENTED.

1. Did the decision of the Illinois Supreme Court in affirming the judgment of the Municipal Court of Chicago finding the respondents "not guilty" wherein they held "that it was not the intent of the legislative authority of the City of Chicago to include by the use of the phrase 'within the city' the operation of the respondent corporation, involve a federal question so as to subject the decision to review by this Court?

2. If it is held that the Supreme Court of Illinois based its decision upon the privilege or an immunity of the respondent as a carrier of interstate commerce are the findings of the Municipal Court of Chicago and the Supreme Court of Illinois contrary to the manifest weight of the evidence in holding (a) that the interstate and intracity business of the respondent was inseparable, and that the respondent could not give up one and continue the other?

3. Whether or not an "undue burden" on Commerce is shown by the facts and circumstances in this case?

ARGUMENT.

I.

The Supreme Court of Illinois did not decide a Federal question.

The tax levied by this Ordinance is not an *ad valorem* tax or property tax neither is it a "road tax". It is not a regulatory ordinance but purely a revenue ordinance levied as an occupational tax against an already over-burdened industry.

Had the Supreme Court of Illinois construed the phrase "within the city" as contended for by the respondent the effect of the ordinance would have been to levy a tax indiscriminately upon any vehicle operating at any time within the limits of the city even if its operation was but a segment of interstate commerce and the ordinance would certainly be repugnant to the Commerce Clause of the Constitution. (*Sprout-Davis* v. *South Bend*, 277 U. S. 166; *Osborne* v. *Florida*, 164 U. S. 650; *Pullman* v. *Adams*, 189 U. S. 420)

The Supreme Court of Illinois rejected the argument of the respondent "Cartage Company" and adopted the interpretation of the words "within the city" suggested by the petitioner. (R. 24) The question of whether or not it was the intent of the City of Chicago in passing the ordinance in question to include the intrastate and interstate business of the defendant corporation is clearly a non-federal question. The State Court stated "that the question is one of application of the ordinance to the practical aspects of the hauling done by the defendant."

(Tr. 25) In adopting this construction of the words "within the city" the Supreme Court of Illinois followed the case of *Pacific Express Co.* v. *Seibert*, 142 U. S. 339, and held that the phrase "within the city" as used in the ordinance meant purely intracity commerce.

The opinion of the Supreme Court specifically held that the ordinance "is not invalid by its terms" (Tr. 22) and found that it was not the intent of the council of the City of Chicago to impose an occupational tax upon the operation of this respondent or others similarly situated. The Court merely construed the ordinance and found that it was not the legislative intent to levy an occupational tax upon carters whose operations were not confined entirely to the corporate limits of Chicago and in passing upon this question said:—

> "It is the law in this State that this court will give a construction to a statute which will uphold its validity. The presumption is always in favor of the validity of an ordinance passed in pursuance of statutory authority. *City of Chicago* v. *Hebard Express and Van Co.*, 301 Ill. 570. * * *
>
> It seems clear that the ordinance in question is not invalid by its terms, but could be held to be so by reason of its application to certain operators of carts, under the definition of the ordinance, in and around the city of Chicago. In other words, the ordinance is not invalid per se. It is only upon its application that a question of its constitutionality can arise. In *Pacific Express Co.* v. *Seibert*, 142 U. S. 339, it was said, 'Business done within this State' cannot be made to mean business done between that State and other States. We, therefore, concur in the view of the court below that it was not the legislative intention, in the enactment of this statute, to impinge upon interstate commerce, or to interfere with it in any way whatever; and that the statute, when fairly con-

strued, does not in any manner interfere with interstate commerce. Thus, we find that the ordinance in question here, when construed in the light of the above language, is invalid only when it is applied to interstate commerce in its fullest sense." (Tr. 24, 25)

The Supreme Court of Illinois held that the ordinance was not applicable to the business of the respondent and made its position clear by saying:—

"It appears, insofar as we can ascertain from this record, that the defendant herein operates its trucks under contract with large industries, and, in the main, with other interstate carriers bringing property into the city of Chicago. The defendant itself does not determine what articles it shall carry on its trucks, but carries articles of all kinds, in interstate, intrastate and intracity traffic. It has no basis for differentiating between the shipments which it carries on its trucks, but carries what is given it by the contractor, retailer or carrier with whom it is dealing, and on every load the three types of property are so intermingled as to be impossible of separation. *It is apparent from these statements that the type of business done by the defendant herein is not one generally considered to be within the meaning of a carter's ordinance.* The defendant does not keep records of the shipments because he does not handle the shipments as such. He does not go from house to house picking up shipments for delivery within the city of Chicago, but his entire business is concerned with hauling under contract for various firms, enterprises and other contract carriers in the city of Chicago." (Tr. 27) (Italics ours.)

The Supreme Court of Illinois did not adjudicate any federal question and its decision was predicated upon the non-federal ground that it was not the intent of the council of the City of Chicago to levy an occupation tax upon

carters engaged in intrastate and interstate commerce. It merely adopted the petitioner's view and construed the phrase "within the city" as used in the Carter's Ordinance so as to exclude all transportation where the point of origin and the point of destination were not both within the corporate limits of Chicago or where such transportation within the city was but a segment of interstate operation and held that the ordinance was inapplicable by its terms to the intrastate as well as the interstate operations of the respondent. It certainly is within the province of a state court to construe its state statute particularly where it so construed such statute as to render it not obnoxious to the Federal Constitution.

It is true that the Supreme Court of Illinois in arriving at its conclusion discussed federal cases involving interstate commerce but this discussion was in general terms. The Supreme Court of Illinois employed the decisions under the Federal Constitution merely as persuasive authority for their independent interpretation of the language of the ordinance.

The Court in its clarifying opinion specifically said:—

> "Our decision is that the Chicago Carter's Ordinance is valid, but, in the light of the rule of the foregoing cases could not be applied to the Willett Company because of the uncontradicted evidence which removes the Willett Company from the application of the license tax." (Tr. 40)

This statement of the Supreme Court of Illinois is entirely consistent with their original decision that it was not the intent of the city council to include within the preview of the ordinance the business of a Carter doing both a local and interstate business. (Tr. 32)

A Writ of Certiorari must be dismissed, where the state court's decision rests on non-federal ground, notwithstanding unnecessary discussion of constitutional question. (*Geo. O. Richardson Machinery Co.* v. *Scott*, Okla. 1928, 48 S. Ct. 264, 276 U. S. 128, 72 L. Ed. 497; *McCoy* v. *Shaw*, Okla. 1928, 48 S. Ct. 519, 277 U. S. 302, 72 L. Ed. 891.)

The Federal Supreme Court will not review a state court decision resting on an adequate and independent non federal ground, though the decision also rests upon an erroneous view of federal law. (*Radio Station WOW* v. *Johnson*, Neb. 1945, 65 S. Ct. 1475, 326 U. S. 120, 89 L. Ed. 2092.)

Where a decision of a state court might have been either upon a state ground or a federal ground and the state ground is sufficient to sustain the judgment, the United States Supreme Court will not undertake to review it. (*Williams* v. *Kaiser*, Mo. 1945, 65 S. Ct. 363, 323 U. S. 471, 89 L. Ed. 398; *Fox Film Corporation* v. *Muller*, Minn. 1935, 56 S. Ct. 183, 296 U. S. 207, 80 L. Ed. 158; *Lynch* v. *People of New York, ex rel. Pierson*, 1934, 55 S. Ct. 16, 293 U. S. 52, 79 L. Ed. 191; *Kinlger* v. *Missouri*, Mo. 1871, 13 Wall. 257, 20 L. Ed. 635.)

The construction placed on a state law or ordinance is conclusive on United States Supreme Court. (*International Union, U. A. W., A. F. of L., Local 232* v. *Wisconsin Employment Relations Bd.*, Wis. 1949, 69 S. Ct. 516, 336 U. S. 245; *Oklahoma Tax Commission* v. *Texas Co.*, Okla. 1949, 69 S. Ct. 561, 336 U. S. 342.) What the statutes of a state means, the extent to which it may be limited are questions on which the highest court of a state has the final word. (*Musser* v. *State of Utah*, 1948, 68 S. Ct. 397, 333 U. S. 95, 92 L. Ed. 562; *Senn* v. *Tile Layers Protective*

Union, Local No. 5, Wis. 1937, 57 S. Ct. 857, 301 U. S. 468, 81 L. Ed. 1229. See also *Atchison T. & S. F. Ry. Co.* v. *Railroad Commission of State of California,* 1931, 51 S. Ct. 553, 283 U. S. 380, 75 L. Ed. 1128.)

A federal question does not arise where the claim is made that a state statute is inconsistent with the power of Congress to regulate commerce among the states, and the highest court of the state holds that the statute was intended to apply and applied only to domestic transportation. (*Erie R. Co.* v. *Purdy,* N. Y. 1902, 22 S. Ct. 605, 185 U. S. 148, 46 L. Ed. 847)

II.

If the Supreme Court decided Federal questions its decision is in accordance with the decisions of this Court and its findings that (a) the interstate and local business of the respondent was inseparable; (b) that the respondent could not give up its intracity business and continue its intrastate operation and that (c) the tax levied upon an instrumentality used in both operations was necessarily a burden upon interstate commerce are supported by the evidence.

A tax on an instrumentality used in interstate commerce is a burden on interstate commerce and such a tax cannot be sustained unless it appears affirmatively in some way that the tax is levied only as compensation for the use of the highway or to defray the expenses of regulating motor traffic. Unless it is shown that the nature of the imposition is such as is directly proportionate to the use of the roads or services rendered by the city or if it bears no reasonable relation to the privilege of using the highway, it cannot be given presumptive validity. (*Interstate Busses Corporation* v. *Blodgett,* 276 U. S. 245; *Sprout* v. *South Bend,* 277 U. S. 170.)

The cases indicate that an instrumentality of interstate commerce can be taxed by a state or municipality only when the subject of that commerce which arises from interstate commerce can be distinguished from that which arises from commerce wholly within the state or municipality. *Lehigh Valley R. Co.* v. *Penn.*, 145 U. S. 200, 26 L. Ed. 672; *Hanley* v. *Kansas City Southern R. Co.*, 187 U. S. 620.

In the case of *East Ohio Gas Co.* v. *Tax Commissioner of Ohio*, 283 U. S. 405; 75 L. Ed. 1171, the Court held that an occupational tax on one engaged both in interstate and intrastate commerce to be valid must be imposed solely on account of the interstate business without enhancement because of interstate business done and it must appear that one engaged exclusively in interstate commerce would not be subject to the imposition and that the taxpayer could discontinue intrastate busines without withdrawing also from the interstate business.

A.

There is ample evidence in the record to support the decision of the Municipal Court of Chicago and the Supreme Court of Illinois that the intracity operations of the respondent were in fact inseparable from its intrastate operations and that the respondent could not discontinue one and remain in the other.

The petitioner argues that the evidence is insufficient to establish inseparability of the respondent's Interstate and Intracity operations. The Supreme Court of Illinois noted this argument and said:—

> "As we have previously stated, the question here is one of application of the ordinance to the practical aspects of the hauling done by the defendant.

> In addition to arguing that the statute itself provides only for taxation upon persons transporting property 'within the city' and that this deals only with intrastate business, the city of Chicago admits that where the intracity and interstate operations are inseparable, and the defendant cannot separate the two, nor continue to engage in business if separation is attempted, the argument as to the tax being a burden upon interstate commerce might apply." (Tr. 25)

In order to argue this issue it is necessary to outline the nature of the respondent's business as shown in the record. The respondent owned a number of trucks which they leased to various concerns in the City of Chicago. The respondent furnished a driver with each truck. The lessee placed various parcels, packages, etc. in the truck fo be carried in intra and interstate commerce as well as in local commerce. The respondent exercised no control over the vehicles or the destination of the freight carried. (Tr. 12)

An example is the respondent's operation with the Pennsylvania Railroad Co. The Pennsylvania Railroad Co. used these leased trucks to pick up packages and freight in Chicago which were delivered to the Pennsylvania Railroad station in Chicago to be transported by rail to points outside the State. Similar freight received at the station from points outside the State is delivered in respondent's trucks to various places in Chicago and to other carriers to be delivered to points within and outside of the State. In all of these instances the carriage by the respondent though wholly within the City is but an integral part of interstate transportation.

Similarly under its contract with the Glidden Company and other companies the respondent provided trucks and drivers. The trucks are loaded with freight at the Glidden Company in Chicago. When so loaded the truck

contains freight and parcels to be delivered to various other companies within the limits of the city of Chicago together with freight and parcels to be delivered outside of the City of Chicago to points in the State of Illinois and to points outside of the State of Illinois. In both types of operation respondent exercised no control over the vehicles or the destination of the freight or its nature and deliveries. This was done solely and exclusively upon orders given the driver by the Glidden Company.

Predicated upon these situations Howard L. Willett, Jr., an executive vice president for the respondent company testified that the interstate, intrastate and local business of the respondent company was not divisible as the company must offer a general flexible freight service to its clients in order to remain in business and that the respondent could not withdraw from the interstate business and continue in the intrastate business as it must completely serve the transportation needs of its shipper. (Tr. 12) These unrebutted facts certainly made out a *prima facie* case of inseparability.

In the cases of *Osborne* v. *Florida,* 164 U.S. 650, 41 L. Ed. 586 and *Pullman Company* v. *Adams,* 189 U.S. 420, 47 L. Ed. 877 this Court held similar enactments valid only because it affirmatively appeared that the intrastate and interstate business of the defendant was, in fact, separable. In the case at bar the evidence clearly shows and both the Municipal Court of Chicago and the Supreme Court of Illinois held, in a finding of fact, that it was "impossible to separate the intracity, intrastate and interstate business of the respondent".

The case of *Sprout-Davis* v. *South Bend,* (277 U.S. 166, 72 L. Ed. 833) is a case involving an ordinance of the City of South Bend, Indiana prohibiting with certain exceptions the operation on its streets of any motor bus for hire

unless licensed by the City. The carrier claimed that the ordinance violated the Commerce Clause and the Equal Protection Clause of the Fourth Amendment. Sprout carried passengers both in intrastate and interstate commerce. The license fee imposed was not an incident to any scheme of municipal regulations but as in the case at bar was for revenue only. In this case the Court held:

"It follows that on the record before us the exaction of the license fee cannot be sustained either as an inspection fee or as an excise for the use of the streets of the city. It remains to consider whether it can be sustained as an occupation tax. A State may, by appropriate legislation, require payment of an occupation tax from one engaged in both intrastate and interstate commerce.

* * *

And it may delegate a part of that power to a municipality.

* * *

But in order that the fee or tax shall be valid, it must appear that it is imposed solely on account of the intrastate business; that the amount exacted is not increated because of the interstate business done; that one engaged exclusively in interstate commerce would not be subject to the imposition *and that the person taxed could discontinue the intrastate business without withdrawing also from the interstate business.* *Leloup* v. *Port of Mobile*, 127 U.S. 640; *Crutcher* v. *Kentucky*, 141 U.S. 47, 58; *Adams Express Co.* v. *New York*, 232 U.S. 14, 30; *Bowman* v. *Continental Oil Co.*, 256 U.S. 642, 647. Compare *Williams* v. *Talladega*, 226 U.S. 404, 417; *Postal Telegraph Cable Co.* v. *Richmond*, 249 U.S. 252. The Supreme Court of Indiana, far from construing the ordinance as applicable solely to busses engaged in interstate commerce, assumed that it applied to busses engaged exclusively in interstate commerce and that Sprout was so engaged. The privilege of engaging in such com-

merce is one which a State cannot deny. *Buck* v. *Kuykendall*, 267 U.S. 307; *Bush & Sons Co.* v. *Maloy*, 267 U.S. 317. A State is equally inhibited from conditioning its exercise on the payment of an occupation tax:"

The case of *Leloup* v. *Port of Mobile*, 127 U.S. 650, and the case of *Rotterman*, v. *The Western Union Telegram Company*, 127 U.S. 411, both hold that a tax upon an occupation engaged both in inter and intrastate commerce is obnoxious to the constitution unless it appears that the intrastate and interstate business can be separated and so taxed.

In the case of the *Northern Pacific Ry. Co.* v. *Washington*, (222 U.S. 370) the train in question although operating from one point to another in the State of Washington, was also hauling merchandise from points outside of the State, destined to points within the State and from points within the State to British Columbia as well as carrying merchandise which had originated outside of the State and was in transit through the State to a foreign destination. The Court held this to be interstate commerce and the train an interstate train, despite the fact that it also carried local freight between points in the State of Washington and *in view of the unity and indivisibility of the service and the paramount character of the authority of Congress to regulate commerce, the Act of Congress was exclusively controlling.*

The case of *Cooney, Governor of Montana* v. *The Mountain States Telephone and Telegraph Company*, 294 U.S. 384; 79 L. Ed. 934 is legally identical with the case at bar. In that, the State of Montana taxed each telephone instrument used by the defendant. The telephones were used in intrastate and interstate commerce. The company could not discontinue its intrastate business without destroying its interstate business. In passing upon this case the Court said at page 392:

"A State cannot tax interstate commerce; it cannot lay a tax upon the business which constitutes such commerce or the privilege of engaging in it. And the fact that a portion of the business is intrastate and therefore taxable does not justify a tax either upon the interstate business or upon the whole business without discrimination. *Leloup* v. *Mobile,* 127 U.S. 640. There are 'sufficient modes' in which the local business may be taxed without the imposition of a tax which covers the entire operations." id. p. 647; See *Williams* v. *Talladega,* 226 U.S. 404, 419. Where the tax is exacted from doing both an interstate and intrastate business, it must appear that it is imposed solely on account of the latter; that the amount exacted is not increased because of the interstate business done; that one engaged exclusively in interstate commerce would not be subject to the tax; *and that the one who is taxed could discontinue the intrastate business without also withdrawing from the interstate business. Sprout* v. *South Bend,* 277 U.S. 163; *East Ohio Gas Co.* v. *Tax Commission,* 283 U.S. 465, 470. (Italics Ours)

"A privilege or occupation tax which a state imposes with respect to both interstate and intrastate business, through an indiscriminate application to instrumentalities common to both sorts of commerce, has frequently been held to be invalid. *Leloup* v. *Mobile, supra; Pickard* v. *Pullman Southern Car Co.,* 117 U.S. 34, 46; *Crutcher* v. *Kentucky,* 141 U.S. 47, 59; *Adams Express Co.* v. *New York,* 232 U.S. 14, 29, 31; *United States Express Co.* v. *New York,* 232 U.S. 35, 36; *Bowman* v. *Continental Oil Co.,* 256 U.S. 647, 648. In the case of the express companies, the principle was applied to a privilege tax imposed alike with respect to wagons used in the movement of both interstate and intrastate shipments. The local shipments 'were handled in the same vehicles and by the same men' that were employed in connection with the interstate transportation and it was impracticable to effect a separation. *Adams Express Co.* v. *New York,*

supra; United States Express Co. v. *New York, supra.* In *Bowman* v. *Continental Oil Co. (supra)* the question arose under a statute of New Mexico, laying an annual license tax of fifty dollars for each station distributing gasoline." (Italics ours)

This is the same situation that exists in the case at bar. Under its contracts the respondent carries freight in interstate commerce as well as freight in intrastate and local commerce. The tax in question is directed against the vehicle carrying these packages. This vehicle in the case at bar is an integral instrumentality of interstate commerce. This ordinance is an attempt to tax the instrumentality. The respondent being unable to separate its interstate and intrastate business and being unable to give up either and continue in business the ordinance is invalid if construed to apply to the operations of the respondent. It has repeatedly been held that the question of separability is a question ultimately for the State Court. (*Meyer* v. *Wells*, 223 U.S. 298, 56 L. Ed. 445)

In every case found where the tax was levied against an instrumentality necessarily used in both local and interstate commerce and where it appeared that the local and interstate operations were inseparable and that the carrier could not give up one and continue in the other, the enactment was held invalid as repugnant to the Constitution.

B.

A tax upon an instrumentality of interstate commerce constitutes an undue burden upon interstate commerce.

The petition argues that there is no proof in the record that the proposed tax of the City of Chicago upon the vehicles of the respondent created an undue burden upon interstate commerce and that a showing of inseparability between the interstate and the intracity commerce of the

respondent's business was insufficient to prove that the tax was an undue burden upon the interstate phase of respondent's business.

The petitioner fails to recognize the clear line of demarcation between the cases (1) where the tax is upon the gross amount of intrastate business done and (2) cases where the tax is levied upon an instrumentality of interstate commerce. It seems quite obvious that where a tax is levied against the interstate business of a company doing both intrastate and interstate business the burden is upon the respondent to show that the tax imposes an undue burden upon the interstate business of the company. This is because a tax upon gross incomes or profits derived from intrastate business is not a direct tax upon interstate commerce and may not and usually does not affect the interstate operation and if it does the effect is incidental.

Where the tax is levied solely upon the income or profit from purely intracity operations the tax may or may not be a burden upon interstate commerce of a carrier doing both intrastate and interstate business. In such a situation it is incumbent upon the carrier to show (1) that the intracity and interstate business are in fact inseparable and that the carrier cannot discontinue operations in one without discontinuing the other and (2) that the tax imposed is an undue burden on interstate commerce. The reason for this rule lies in the fact that the tax levied on intracity business is at best only an indirect and incidental burden upon interstate commerce, if a burden at all. On the other hand where the tax is levied against an instrumentality used in both intracity and interstate commerce and there is a showing that the two types of operations cannot be separated and that the carrier cannot engage in one and discontinue the other, the

tax is direct and it necessarily follows that is a burden upon interstate commerce.

The fact that the tax may be small when considered in its relationship to the entire business of a company engaged in interstate commerce is immaterial. No Court can formulate an exact standard by which the question of undue burden can be measured. An undue burden therefore must be presumed from inseparability. To hold otherwise would require the Court to determine this factual question in each instance without requisite standard.

The petitioner in support of his argument relies almost exclusively on the decision of this Court in the case of *Pacific Telephone and Telegraph Co. v. Washington Tax Com.* (297 U.S. 403, 80 L. Ed. 760) where the Court sustained the validity of a local taxing statute as against the objection that it was obnoxious to the commerce clause of the Federal Constitution. This Court held the act valid because of the lack of proof of undue burden on commerce although it held that the local and interstate operations were "inextricably entwined." The petitioner, however, fails to point out that the tax sought to be levied in this case was a tax upon the gross income from intrastate commerce. It was not a tax levied upon an instrumentality necessarily used in both local and interstate commerce as in the case at bar.

The case of *Cooney* v. *Mountain State Telephone & Telegraph Co.*, 294 U.S. 384, 79 L. Ed. 934 (rather than the cases cited by petitioner) is in point for in the *Cooney* case this Court held that a privilege or an occupation tax which a state or municipality imposes with respect to both interstate and intrastate business through indiscriminate application to instrumentalities common to both sorts of commerce is invalid where the operation cannot

be separated. It was apparent that the tax on the telephone instruments created a burden on the interstate operations of the company without further proof.'

It is obvious that the ordinance is invalid unless the construction of the State court is adopted. It is a tax upon trucks that carry both intrastate and interstate freight. It is a tax upon an instrumentality of interstate commerce. Even though the tax may be small in amount it necessarily is a burden upon interstate commerce.

CONCLUSION.

It is respectfully submitted that the Supreme Court of Illinois did not pass upon a federal question and that the basis upon which this review was permitted is, in fact, non-existence and for this reason the Writ of Certiorari should be dismissed, or, in the alternative, the judgment of the Supreme Court of Illinois should be affirmed, as the decision is not in conflict with federal law.

Respectfully submitted,

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